No. 92-833-CFX Title: Kevin Albright, Petitioner
v.
Roger Oliver, etc., et al.

Docketed: November 12, 1992 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Nov 12 1992	Petition for writ of certiorari filed.
	Dec 16 1992	DISTRIBUTED. January 8, 1993
	Jan 4 1993	Response requested. (Due February 4, 1993)
	Feb 4 1993	Brief of respondents Roger Oliver, et al. in opposition filed.
	Feb 10 1993	REDISTRIBUTED. February 26, 1993
	Feb 17 1993	Reply brief of petitioner filed.
	Mar 1 1993	Petition GRANTED.
		**********
	Mar 31 1993	Order extending time to file brief of petitioner on the merits until April 30, 1993.
	Apr 14 1993	Joint appendix filed.
	Apr 26 1993	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Apr 29 1993	Brief of petitioner filed.
	May 7 1993	Order extending time to file brief of respondent on the merits until June 25, 1993.
	May 24 1993	Record filed.
	Jun 25 1993	Brief amici curiae of National League of Cities, et al. filed.
	Jun 25 1993	Brief of respondents Roger Oliver, et al. filed.
	Jul 14 1993	Application (A93-55) extension of time to file reply brief, submitted to Justice Stevens.
	Jul 19 1993	Application (A93-55) granted by Justice Stevens extending the time to file until August 9, 1993.
	Aug 6 1993	CIRCULATED.
	Aug 6 1993	Reply brief of petitioner filed.
	Aug 16 1993	SET FOR ARGUMENT TUESDAY, OCTOBER 12, 1993. (2ND CASE).
	Oct 12 1993	ARGUED.

92-833

No. _____

SUPREME COURT, U.S.
FILED
NOV 12 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

KEVIN ALBRIGHT,

Petitioner,

vs.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and the CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a baseless prosecution, initiated and pursued without an objectively reasonable belief in the existence of probable cause to suspect the accused of criminal wrongdoing, infringe liberty protected by the Due Process Clause and thereby permit an action pursuant to 42 U.S.C. § 1983 absent incarceration or other accompanying loss or alteration of a "protected status" such as that recognized in *Paul v. Davis*, 424 U.S. 693 (1976)?

PARTIES IN THE COURT BELOW

Petitioner, Kevin Albright, was the plaintiff-appellant in the court below. Respondents Roger Oliver, individually and in his official capacity as a police detective with the city of Macomb, Illinois and the city of Macomb, Illinois, an Illinois municipal corporation, were the Defendants-Appellees below.

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No. _____

In The

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KEVIN ALBRIGHT,

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vs.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and the CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kevin Albright, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming dismissal of Petitioner's complaint by the United States District Court for the Central District of Illinois, Peoria Division, (Mihm, J.).

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 975 F.2d 343. The opinion and order of the district court (Mihm, J.) (App. B, *infra*, 13a-26a), is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra* 27a), was entered September 14, 1992. This Petition for Certiorari is being brought within 90 days of that judgment as Petitioner did not seek rehearing in the court of appeals. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

A. United States Constitution, Amendment IV.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. United States Constitution, Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed

> . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for its defense.

C. United States Constitution, Amendment XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

D. 42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioner, Kevin Albright, sued Respondents, Macomb, Illinois police detective Roger Oliver and the city of Macomb, Illinois under 42 U.S.C. §1983. He alleged a

deprivation of rights secured by the Due Process Clause of the Fourteenth Amendment deriving from his baseless criminal prosecution by Oliver in Illinois state court. Albright invoked the district court's jurisdiction under 28 U.S.C. §§1331 and 1343.

The district court dismissed, pursuant to Rule 12(b)6, Fed.R.Civ.P., Albright's claims alleging a wrongful prosecution as a cause of action under §1983.[1] The court of appeals affirmed. It said that although this Court had not resolved whether a malicious prosecution violated the Constitution, its decision in *Paul v. Davis*, 424 U.S. 693 (1976), holding that defamation by a public officer is not a constitutional tort, "provides a clue to the answer that [this] Court is likely to give. . . . " App. 5a. The court of appeals said that the actions of Oliver were "shocking", and "may well have . . . exceeded" "[t]he limits of reasonable police conduct". App. 4a. But, "in the absence of incarceration or other palpable consequences", the court held Oliver's conduct was not actionable as a constitutional wrong. App. 9a.

The complaint[2] alleged that in March, 1987, Veda Moore, recently released from a rehabilitation hospital for a cocaine addiction, asked Oliver for "police protection"

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[1] The district court also ruled that Oliver was entitled to qualified immunity and that the complaint did not sufficiently allege a policy on the part of the city of Macomb. App. B, 24a-26a. The Petitioner voluntarily dismissed a common law malicious prosecution claim. App. D, 29a-30a. The district court permitted plaintiff to amend after it had entered its order dismissing plaintiff's claims. App. E, 31a-33a. The judgment of the district court appears as App. F, 34a, *infra*.

[2] App. G, *infra*, 35a-83a.

from a drug dealer who was threatening her for non-payment of cocaine debts. Oliver agreed to give her police protection on the condition she serve as an informant by making purchases of cocaine and other controlled substances throughout Macomb, Illinois, a university town of approximately 25,000.

Oliver did not direct Moore to individuals whom he suspected or had probable cause to believe were engaged in illegal activity. Instead, he told her to make purchases from people whom she would identify as engaged in such activity. Oliver arranged to give her between $100 – $125 with which to make the purchases. He agreed to pay her between $50.00 to $75.00 for purchases she would represent as being of controlled substances.

The complaint alleged that because of her cocaine addiction, Oliver knew or should have known that it was beyond Moore's physical and emotional power to control her craving for cocaine.[3] The complaint alleged that he knew or should have known it was unreasonable to place her in a position where she was being asked to make purchases of the very substance to which she was addicted.

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[3] T. Gorski, *Managing Cocaine Craving*, Hazeldon Educational Materials, ISBN: 0-89486-674-5 at 1, 8 (1990); National Institute on Drug Abuse, Dept. of Health and Human Services, Pub. No. (ADM)88-1559, *When Cocaine Affects Someone You Love*, 4 (1987); Washton and Stone-Washton, *Abstinence and Relapse in Outpatient Cocaine Addicts*, 22 J. Psychoactive Drugs 135 (1990); Rawson, Obert and McCann, *Cocaine: Recovery Issues*, May/June Addiction & Recovery, 29, 30-32 (1991).

Over the spring and summer of 1987, Moore represented to Oliver that she made purchases of primarily cocaine from over 50 separate individuals. Among the purchases she said was a purchase of cocaine from Kevin Albright at a room of a student and transient bar and hotel, on July 17, 1987. Albright and the other 50 people were separately prosecuted under various criminal statutes. All of those prosecutions were dismissed or otherwise aborted without convictions.

Most prosecutions, including Albright's, were hindered from the beginning because what Moore represented was cocaine was, in fact, baking powder. The prosecution of Albright was further hindered because he was the third individual Oliver had charged with selling Moore the same substance from the hotel on July 17, 1987. He implicated Kevin's father, John Albright, Jr., and his older brother, John David Albright, before him in that putative transaction.

That sequence began when, on the basis of information given him by Moore, Oliver testified before a McDonough County, Illinois grand jury on September 10, 1987, that John Albright, Jr. sold her a "look-alike" substance contrary to *Ill.Rev.Stat.* Ch. 56½ §1404(b).[4] The grand jury indicted John Albright Jr. and a warrant issued for his arrest. When Oliver went to arrest John Albright,

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[4] *Ill.Rev.Stat.* Ch. 56 ½ §1404(b) provides, "it is unlawful for any person knowingly to manufacture, distribute, advertise, or possess with intent to manufacture or distribute a look-alike substance. Any person who violates this subsection (b) shall be guilty of a Class 3 felony, the fine for which shall not exceed $150,000.00."

Jr. on September 28, 1987, he learned from John Albright Jr.'s wife that Albright was a man over 60 years of age, a retired registered pharmacist, and not likely the type who would have known or dealt with Moore, or sold her what he represented was cocaine from a room in a student – transient hotel.

Oliver also learned from Mrs. John Albright, Jr. that the Albrights had two sons, Kevin and John David Albright. Oliver assumed he was looking for John David Albright. He scratched the name John Albright, Jr. from the arrest warrant and replaced it with the name John David Albright without further investigation.

By September 28, 1987, John David Albright was living in Chicago where, since September, 1986, he had worked managing a restaurant. He had been so engaged at the time Oliver accused him of selling a "look-alike" substance to Moore in Macomb. Upon learning of the warrant for his arrest, John David Albright traveled on October 1, 1987, 200 miles to Macomb from Chicago and advised Oliver of those facts.

On the basis of what John David Albright told him, Oliver telephoned Moore who, by October 1, lived in Florida, and told her that neither John Albright, Jr. nor John David Albright could have sold her what was represented as cocaine. Oliver suggested to Moore it might have been John David's brother, Kevin, from whom she made the purchase. Moore agreed. Oliver then scratched John David Albright's name from the arrest warrant and replaced it with Kevin Albright's.

However, since the grand jury's indictment of John Albright, Jr. would not support the arrest of someone

named Kevin Albright, on October 16, 1987, Oliver attested to a criminal information charging that on July 17, 1987, Kevin Albright had sold the "look-alike" substance to Moore and a warrant issued for Kevin Albright's arrest.[5] Albright surrendered and advised Oliver that he was in Macomb on July 17, 1987, but did not sell anything to Moore and was not otherwise involved in drug activity. Oliver placed Albright under arrest and required that he post bond of $3,500.00. Albright did that by paying a non-refundable 10% of that sum to the Illinois Circuit Court Clerk.[6]

On January 5, 1988, Oliver testified at a preliminary hearing that Kevin Albright sold the "look-alike" substance to Moore on July 17, 1987. Oliver did not bring to the court's attention his testimony under oath four months earlier to the grand jury that John Albright, Jr.

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[5] In Illinois when the prosecution of a felony is begun by the filing of an information, the court is required to "immediately issue a warrant for the arrest [of the person charged]." *Ill.Rev.Stat.* Ch. 38 §111-2(d). Thereafter, a preliminary hearing is required to determine, "if from the evidence that appears there is probable cause to believe an offense has been committed . . . ". *Ill.Rev.Stat.* Ch. 38 §109-3.

[6] *Ill.Rev.Stat.* Ch. 38 §110-7(a) and (f) provide in relevant part as follows: (a) "the person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.00"; and (f) "when the conditions of the bail bond have been performed and the accused has been discharged from all obligations and the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited.

had sold the same "look-alike" substance to Moore on July 17. He did not advise that he had accused John David Albright of the same offense. He did not advise of Moore's cocaine addiction or that he was unable to corroborate any of the information she had given him including the nature of the substance. Because of those omissions, probable cause was found.

On June 27, 1988, the Illinois Circuit Court dismissed the criminal action against Kevin Albright on the grounds that the charge did not state an offense under *Ill.Rev.Stat.* Ch. 56½ §1404(b). During the period while the prosecution pended, Albright was, by a statutorily mandated condition of his bond, restricted in his travel to the territorial limits of Illinois.[7] By reason of that restriction and the legal cost to remove it, Albright did not travel to St. Louis to interview for employment opportunities available after he completed what was then his senior year at Western Illinois University. During the pendency of the prosecution, there was media coverage. To the extent that coverage identified Kevin Albright as linked to narcotics trafficking, it was false in fact.

Up to the dismissal of the charges against Albright, Oliver had relied exclusively on what Moore told him. He attempted no independent verification by the use of such as marked bills, eavesdropping devices, or personal surveillance. He did not independently inquire what Moore

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[7] *Ill.Rev.Stat.* Ch. 38 §110-10(a)(3) provides:

(a) If a person is admitted to bail before conviction the conditions of the bail bond shall be that he will: . . .

(3) Not depart this State without leave.

had done when she said she purchased cocaine from any of the Albrights at the hotel on July 17, 1987.

Incident to Oliver's investigation, Moore purchased cocaine for herself with the money ($7-10,000) he had paid her. As a result, she suffered a relapse and her cocaine addiction worsened resulting in her hospitalization for two months beginning January, 1988.

REASONS FOR GRANTING THE WRIT

A.

THE SEVENTH CIRCUIT'S DECISION PLACES IT IN CLEAR CONFLICT WITH THE SECOND, THIRD, FOURTH, FIFTH, TENTH AND ELEVENTH CIRCUITS, AND LESS CLEAR CONFLICT WITH THE FIRST, SIXTH AND NINTH CIRCUITS.

Dissenting from the denial of certiorari in *Campbell v. Brummett*, ___ U.S. ___, 119 L.Ed.2d 241, 242 (1992), and noting the "clear disagreement among the courts of appeals", Justice White said that whether a malicious prosecution stated a cause of action under §1983 "is an area of law that requires [this Court's] attention." In her opinion for the Fifth Circuit in *Brummett v. Camble*, 946 F.2d 1178, 1180-81 n.2 (5th Cir. 1991), Judge Jones, after noting the Circuits "ha[d] flip-flopped on the constitutional tort status of malicious prosecution", said, "the Supreme Court may have to decide this question someday." And, writing for the Seventh Circuit in this case, Judge Posner observed that "this is a question on which there is an embarrassing diversity of judicial opinion." App. 5a.

Prior to the Seventh Circuit's decision in this case, there may have been "an embarrassing diversity of judicial opinion". *Id.* However, no Circuit had explicitly held that a malicious prosecution by itself did not violate the Constitution in some respect and, thereby permit an action under 42 U.S.C. §1983. Instead, there was a wide range of often conflicting reasons why a malicious prosecution might violate the Constitution and thereby be actionable under §1983.

At the most permissive end of the range are cases such as the Third Circuit's decisions in *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988), and *Rose v. Bartle*, 871 F.2d 331, 348-49 (3d Cir. 1989). Those cases said that a malicious prosecution coextensive with the common law tort[8] violates the Constitution and is, for that reason, actionable under §1983.

The basic constitutional theory underlying such as *Lee v. Mihalich*, and *Rose v. Bartle* was expressed by the

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[8] The Restatement 2d Torts §653 states the elements of a claim for common law malicious prosecution as follows:

> a private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice and (b) the proceedings have terminated in favor of the accused.

In Illinois, the elements of common law malicious prosecution are (i) the commencement of a criminal proceeding, (ii) without probable cause, (iii) with malice, (iv) the termination of the proceedings in favor of the plaintiff and (v) damages. *Frye v. O'Neill*, 166 Ill.App.3d 963, 965 (4th Dist. 1988).

Fifth Circuit in *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir. 1984). There the court permitted a malicious prosecution, i.e., one without probable cause, to state a §1983 claim on the basis of this Court's statement in *U.S. v. Calandra*, 414 U.S. 338, 343 (1974), that probable cause was required to support a grand jury indictment. However, Judge Gee, writing for the court in *Wheeler, supra*, 734 F.2d at 259, acknowledged that he arrived at that conclusion, "[w]ith no great assurance" in light of this Court's language in *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975), that the "probable cause determination [was] not a constitutional prerequisite to the charging decision. . . . "[9]

A mid-range approach is suggested by such as the Fourth Circuit's decision in *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989). There the court permitted a malicious prosecution action under §1983 if the action of the state actors was "objectively unreasonable" as articulated in *Malley v. Briggs*, 475 U.S. 335 (1986). That approach was followed by the Second Circuit in *Golino v. New Haven*, 950 F.2d 864, 870-71 (2d Cir. 1991) and the Fifth Circuit in *Saunders v. English*, 950 F.2d 1152 (5th Cir. 1992).

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[9] Judge Gee assumed the *Gerstein* language referred to the judicial determination of probable cause as *Gerstein* required if the defendant was incarcerated. Other cases seeming to subscribe to the *Wheeler* approach include *White v. Frank*, 855 F.2d 956 (2d Cir. 1988); *Hand v. Gary*, 832 F.2d 1420 (5th Cir. 1988); *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988); *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1989); and *Brummett v. Camble, supra*.

The court in *Goodwin v. Metts, supra*, 885 F.2d at 163, likened the pursuit of a prosecution to the application for an arrest warrant where " 'a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant,' " quoting *Malley v. Briggs, supra*, 475 U.S. at 345. See also *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988). The court in *Goodwin, supra*, 885 F.2d at 163, quoting *U.S. v. Marion*, 404 U.S. 307, 320 (1971), said,

> [l]ike an arrest, a prosecution is 'a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'

In that light, the court held, "whether a criminal defendant is incarcerated is not decisive in determining if he has suffered an abridgment of constitutional rights." *Id.*

An approach of a seemingly more restrictive yet indeterminate nature is represented by such cases as *Torres v. Superintendent of Police*, 893 F.2d 404, 408 (1st Cir. 1990). That line of cases seems to recognize a cause of action coextensive with the common law tort if the challenged conduct is "so egregious as to rise to the level of a constitutional violation. . . . " *Torres, supra*, 893 F.2d at 408-409. Similar approaches, which the *Torres* court called the "majority rule", have been followed in such cases as

Coogan v. City of Wixom, 820 F.2d 170, 174 (6th Cir. 1987); and *Dunn v. Tennessee*, 697 F.2d 121 (6th Cir. 1982).[10]

Before its decision in this case, the Seventh Circuit position was that "an action for malicious prosecution [could] be brought under §1983 if, acting under color of state law, the defendant has subjected the plaintiff to a deprivation of constitutional magnitude." *Hampton v. Hanrahan*, 600 F.2d 600, 630 (7th Cir. 1979). That view was repeated by an *en banc* Seventh Circuit in *Easter House v. Felder*, 910 F.2d 1387, 1407 (7th Cir. 1990). However, the Seventh Circuit never, until this case, advised what a "deprivation of constitutional magnitude" might be. But, it had said, contrary to such as *Lee v. Mihalich, supra*, and *Rose v. Bartle, supra*, that "the common law tort of malicious prosecution" is not a constitutional wrong remedied by 42 U.S.C. §1983. *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985).

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[10] A variant of this line of cases recognizes malicious prosecution as a cause of action if a specific constitutional violation over and above the customary elements of the common law tort are alleged. That point was illustrated in *Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987), and *Karim – Panahi v. L.A. Police Dept.*, 839 F.2d 621 (9th Cir. 1988), where the court said a §1983 action would lie if the prosecution was pursued with the intent to deprive one of equal protection of the laws. The court of appeals' opinion in this case might fall into this category.

This last, most restrictive line of decisions would also probably allow a §1983 cause of action if the police conduct "shocked the conscience". *Rochin v. California*, 342 U.S. 165, 172 (1952). That point was illustrated by the First Circuit's decision after *Torres, supra*, in *Smith v. Massachusetts Dept. of Corrections*, 936 F.2d 1390, 1402 (1st Cir. 1991).

The foregoing summary demonstrates that the lower courts are in disarray and in need of guidance on the extent to which, if any, a baseless prosecution, if objectively unreasonable in Fourth Amendment terms, might infringe liberty protected by the Due Process Clause. The court of appeals' resolution – that it does not unless accompanied by incarceration or loss of a protected status or other "palpable consequence" – presents a useful framework for analysis. This case is, therefore, well-suited to enable this Court to provide meaningful guidance.

B.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS GIVING CONSTITUTIONAL PROTECTION AGAINST OBJECTIVELY UNREASONABLE SEARCHES AND SEIZURES, ESTABLISHING THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN CRIMINAL CASES, AND DEFINING THE INTERESTS PROTECTED BY SPEEDY TRIAL GUARANTEE, ALL OF WHICH ESTABLISH THE LIBERTY SUBJECT TO CONSTITUTIONAL PROTECTION AGAINST OBJECTIVELY UNREASONABLE PROSECUTIONS.

Petitioner submits the decision below conflicts with the line of Fourth Amendment decisions beginning with *Franks v. Delaware*, 438 U.S. 154 (1977), through *U.S. v. Leon*, 468 U.S. 897 (1984), culminating in *Malley v. Briggs, supra*. Those decisions, together with the due process requirement of proof beyond a reasonable doubt in criminal cases, *In Re Winship*, 397 U.S. 358 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979), and the interests protected

by the speedy trial guarantee, *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *U.S. v. Marion, supra*; and *U.S. v. MacDonald*, 456 U.S. 1 (1982), provide the contours of the liberty subject to constitutional protection against objectively unreasonable prosecutions. That liberty consists of freedom from unnecessary and unreasonable risk of conviction on proof less than beyond a reasonable doubt and the resultant freedom from unnecessary "anxiety and concern accompanying public accusation." *Klopfer v. North Carolina, supra*, 386 U.S. at 222.

The Fourth Amendment probable cause standard operates "to safeguard citizens from rash and unreasonable interferences with privacy *and from unfounded charges of crime.*" *Brinegar v. U.S.*, 338 U.S. 160, 176 (1949) (emphasis supplied). It does that in several preliminary settings, e.g., before a warrant authorizing a search may issue, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); before a search without a warrant may take place, e.g., *Carroll v. U.S.*, 267 U.S. 132, 162 (1925); before an arrest warrant may issue, e.g., *Payton v. New York*, 445 U.S. 573 (1980); before an arrest without a warrant may be performed, e.g., *Draper v. U.S.*, 358 U.S. 307 (1959); and "as a prerequisite to detention" incident to the filing of charges, *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975).

But, probable cause is a "practical, non-technical conception." *Brinegar, supra*, 338 U.S. at 176. It is a conception which "deal[s] with probabilities." *Id.* Consequently, "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Therefore, the probable cause standard is flexible and is applied "to

give fair leeway for enforcing the law in the community's protection." *Brinegar, supra*, 338 U.S. at 176. As such, in enforcing the probable cause standard, "room must be allowed for mistakes [on the part of officers]." *Id.*

The essence of all definitions of probable cause "is a reasonable ground for belief of guilt." *Brinegar, supra*, 338 U.S. at 175. It exists where " 'the facts and circumstances within . . . officers[']knowledge and of which they ha[ve] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar, supra*, 338 U.S. at 175-76, quoting *Carroll v. U.S., supra*, 267 U.S. at 162 (1925).

Since the probable cause standard is a flexible one, this Court has "recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present. . . . " *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). In the criminal search context, such officials will not be made to suffer the exclusion of evidence seized mistakenly but reasonably without probable cause. *U.S. v. Leon, supra*, 468 U.S. at 914. And, such officials will be immune from damage actions under §1983 respecting either a search or an arrest mistakenly but reasonably effected without probable cause. *Malley v. Briggs, supra*; *Anderson v. Creighton, supra*.

But, when an officer proceeds where no reasonably competent officer could have believed probable cause existed, any evidence seized is subject to the exclusionary rule. *U.S. v. Leon, supra*, 468 U.S. at 926. And, an officer

who causes an arrest may be required to answer in damages. *Malley v. Briggs, supra,* 475 U.S. at 343-44. This objective reasonableness standard in the search and arrest contexts under *Leon* and *Malley* respectively thus merges with the standard under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), for invoking qualified immunity. *Malley, supra,* 475 U.S. at 341. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* See also *Anderson v. Creighton, supra,* 483 U.S. at 641.[11]

However, the probable cause determination in the search, arrest, or detention after charge settings "is . . . only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." *Gerstein v. Pugh, supra,* 420 U.S. at 125 n.27 (emphasis in original). After that first stage and after a person is arrested, "the question whether [the] . . . prosecution is unconstitutional passes

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[11] The objective unreasonableness of Oliver's prosecution of Albright is demonstrated by *Illinois v. Gates,* 462 U.S. 213, 232 (1983), where this Court recognized "tips" from informants as providing probable cause. This Court previously held those tips were of many varieties and "var[ied] greatly in their value and reliability." *Adams v. Williams,* 407 U.S. 143, 147 (1972). *Gates, supra* at 242, emphasized the importance of "the probative value of corroborative efforts of police officials . . . " in establishing probable cause. This Court relied on *Draper v. U.S.,* 358 U.S. 307 (1959), as "the classic case on the value of corroborative efforts of police officials." *Gates, supra* at 242.

In this case, Oliver was able to corroborate none of the information Moore gave him. The court of appeals evidently agreed Oliver's actions were objectively unreasonable, calling them "shocking" and "exceed[ing]" "[t]he limits of reasonable police conduct". App. 4a.

over from the Fourth Amendment to the Due Process Clause. . . . " *Jones v. City of Chicago,* 856 F.2d 985, 994 (7th Cir. 1988); *Villanova v. Abrams,* 972 F.2d 792, 797 (7th Cir. 1992). That statement follows from this Court's observation in *Mapp v. Ohio,* 367 U.S. 643, 657 (1961), that "[t]he philosophy of each amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence – the very least that together they assure in either sphere that no man is to be [deprived of constitutionally protected liberties]."

After the probable cause determinations and after the "Fourth Amendment falls away", *Villanova, supra,* 972 F.2d at 797, it is established that due process "protects [an] accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. 358, 364 (1970). That standard "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. As such, it "provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *Id.,* quoting *Coffin v. U.S.,* 156 U.S. 432, 453 (1895).

However, despite the reasonable doubt safeguard built into the criminal justice system, it is recognized that even "a properly instructed jury may . . . convict . . . when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. . . . " *Jackson v.*

Virginia, 443 U.S. 307, 317 (1979).[12] In a federal trial, a conviction thus secured must be reversed. *Id.* In a state trial, the Constitution would require vacation of such conviction. *Id.* at 318.

While the probable cause standard is flexible, *Brinegar, supra*, and may be subject to reasonable disagreement among reasonable officers, *Anderson v. Creighton, supra*, in all contexts, it " 'means *less* than evidence which would justify condemnation' or conviction. . . . " *Brinegar, supra*, 338 U.S. at 175, quoting *Locke v. U.S.*, 11 U.S. (7 Cranch) 339, 348 (1813) (emphasis supplied). Therefore, the evidence necessary to establish probable cause is always less than that necessary to establish proof beyond a reasonable doubt. *Id.*

As this Court noted in *Malley v. Briggs, supra*, 475 U.S. at 345-46, "ours is not an ideal system. . . . " Therefore, just as a properly instructed jury sometimes convicts on proof less than beyond a reasonable doubt, *Jackson v. Virginia, supra*, "it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Malley, supra*, at 346. When that happens, an objectively unreasonable prosecution will not be stopped at the warrant or preliminary hearing stages and an accused will face "unfounded charges of crime." *Brinegar, supra*, 368 U.S. at 176; *Malley, supra* at 346.[13] In that

[12] This is not an abstract concern. See for e.g., Rattner, *Convicted But Innocent*, 12 Law & Human Behavior 283 (1988), and studies cited therein.

[13] Petitioner does not seek to impose liability against Oliver on the basis of his testimony at the preliminary hearing. See *Briscoe v. LaHue*, 460 U.S. 325 (1983). That testimony was consistent with Oliver's initial decision to charge Petitioner and was thus the "natural consequence of [that] action[]" *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986). See footnote 5, *supra*.

event, an officer's pursuit of a prosecution where no reasonably competent officer could have thought he had probable cause, has "created the unnecessary danger of an unlawful [conviction]." *Malley, supra* at 345.

When there is pursuit of an objectively unreasonable prosecution, the result, to be consistent with *Leon, supra*, and *Malley, supra*, must be the same as in those cases. To paraphrase *Malley, supra*, 475 U.S. at 344, "it would be incongruous to test police behavior by the 'objective reasonableness' standard in a suppression hearing" and in a §1983 damages action for false arrest or search "while exempting police conduct" recklessly pursuing a baseless prosecution "from any scrutiny whatsoever in a §1983 damages action." Going beyond the wrongful arrest involved in *Malley* to the wrongful prosecution involved in this case, the rationale of *Malley, supra*, 475 U.S. at 344 is convincing:

> in the case of the §1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefitting the victim of police misconduct one would think most deserving of a remedy – the person who in fact has done no wrong, and has been [prosecuted] for no reason, or a bad reason.

There are additional constitutionally significant consequences which result from subjecting someone to the unnecessary and unreasonable risk of conviction on proof less than beyond a reasonable doubt. This Court has

recognized that unlike the reputational damage caused by the defamatory publication in *Paul v. Davis, supra*, a criminal prosecution involves "the full machinery of the state in scrutinizing any given individual." *Young v. U.S.*, 481 U.S. 787, 814 (1987) (opinion of Brennan, J.). That is because

> [p]rosecutors 'have available a terrible array of coercive methods to obtain information,' such as 'police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wire tapping, civil investigatory demands, [and] enhanced subpoena power'.

Id. at 811, quoting C. Wolfram, *Modern Legal Ethics*, 460 (1986).

Accordingly, "[e]ven if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young v. U.S., supra*, 481 U.S. at 814. Similarly, the Seventh Circuit has observed that "[a]ccusation and trial are wrenching experiences, especially for the innocent." *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1233, vacated ___ U.S. ___, 112 U.S. 40 (1991), affirmed on remand, 952 F.2d 965 (7th Cir. 1992), cert. granted, No. 91-7849, ___ U.S. ___ (Oct. 5, 1992). Therefore, a criminal prosecution subjects a person to a qualitatively different set of forces than those to which the victim of a defamatory utterance is subjected.

This Court has recognized as a " 'major evil' against which the Speedy Trial Clause is directed" the "anxiety and concern accompanying public accusation". *Doggett v. U.S.*, 505 U.S. ___, 120 L.Ed.2d 520, 533 (1992) (Thomas, J.

dissenting). See also *Klopfer v. North Carolina, supra*, 386 U.S. at 222. The liberties protected by the speedy trial guarantee are "quite apart from actual or possible prejudice to an accused's defense." *U.S. v. Marion*, 404 U.S. 307, 320 (1971). Rather, " 'the speedy trial guarantee is designed [among other things] . . . to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused . . . by the presence of unresolved criminal charges.' " *U.S. v. MacDonald*, 456 U.S. 1, 8 (1982).[14]

In *Barker v. Wingo, supra*, 407 U.S. at 530, this Court held that "[u]ntil there is some delay which is presumptively prejudicial", the interests protected by the Speedy Trial Clause were not implicated. But, as implied by the Fourth Circuit in *Goodwin v. Metts, supra*, 885 F.2d at 163, presumptive prejudice similar to that caused by delay in the speedy trial sense occurs at the point of the pursuit of an objectively unreasonable prosecution. That presumptive prejudice occurs because the accused has been unreasonably placed at risk of a conviction on proof less than beyond a reasonable doubt, a violation of due process. *Brinegar, supra*, 338 U.S. at 175; *Jackson v. Virginia, supra*.

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[14] Petitioner argued below that his freedom of interstate movement was restricted by the bond conditions incident to his prosecution. See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); *U.S. v. Guest*, 383 U.S. 745, 757-58 (1966); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257 (1974). Petitioner adheres to that position on certiorari. However, that restriction is better understood as an aspect of the more generalized liberty argued herein.

That risk of conviction on proof less than beyond a reasonable doubt resulting from the pursuit of an objectively unreasonable prosecution necessarily causes the " . . . emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial. . . . " *Strunk v. U.S.*, 412 U.S. 434, 439 (1973). The Due Process Clause, therefore, protects against the unreasonable risk of conviction on proof less than beyond a reasonable doubt and its necessary effects, "anxiety and concern accompanying public accusation", *Klopfer, supra*, 386 U.S. at 222, both resulting from the objectively unreasonable "presence of unresolved criminal charges". *U.S. v. MacDonald, supra*, 456 U.S. at 8.

The foregoing approach is faithful to this Court's precedents that the freedoms enshrined in the Bill of Rights are complementary to each other. *Mapp v. Ohio, supra*, 367 U.S. at 357. It is faithful to the holding of *DeShaney v. Winnebago County*, 489 U.S. 189, 195 (1989), that the Due Process Clause serves "as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security."[15] Petitioner's approach is consistent with the decision last term in *Collins v. Harker Heights*, 503 U.S. ___,117 L.Ed.2d 261, 269 (1992), holding that §1983 provides an "effective remedy against . . . abuses of state power that violate federal law . . . ", rather than an imposition of "federal duties that are

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[15] See also Currie, *Positive and Negative Constitutional Rights*, 53 U.Chi.L.Rev. 864, 873-74 (1985), arguing that the liberties set forth in Sixth Amendment, including the right to speedy trial state "what constitute the process due when the state [seeks] . . . to deprive the individual of his life, liberty or property by means of the criminal law."

analogous to those traditionally imposed by state tort law", *Id.*, at 275. Cf. *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Paul v. Davis, supra*, 424 U.S. 693, 701 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986); and *Davidson v. Cannon*, 474 U.S. 344, 348 (1986).[16]

More than anything government does to the individual, except actual incarceration or execution, public prosecution is the most intrusive and violative of the right "to be let alone – the most comprehensive of rights and the right most valued by civilized men". *Olmstead v. U.S.*, 277 U.S. 438, 478 (Brandeis, J., dissenting) (1928). Public prosecution impinges upon the right to be free from public scrutiny. It extinguishes the right to be free from forced display in a public forum under circumstances of anguished apprehension and embarrassment. It extinguishes the right to be free from apprehension about one's legal future and derivatively economic, social, familial, educational, occupational, and marital futures. *Strunk v. U.S. supra; U.S. v. Marion, supra; Klopfer v. North Carolina, supra; Young v. U.S., supra.*[17]

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[16] Petitioner, therefore, does not seek to "constitutionalize" common law malicious prosecution. See n.8 *supra*. Petitioner probably does not have a viable common law malicious prosecution action as an Illinois statute, *Ill.Rev.Stat.* Ch. 85 § 8-101, creates a one year statute of limitation for advancing various tort claims, including malicious prosecution, against municipal employees. See App. H, 84a, *infra*.

[17] Liability for pursuit of an objectively unreasonable prosecution would lie only in a narrow class of cases where the information the officer provides the prosecutor upon which the prosecutor acts is information "no officer of reasonable competence would have [submitted to the prosecutor]. . . . " *Malley v. Briggs, supra*, 475 U.S. at 346 n.9. In that situation, the requisite

Those intrusive effects of a prosecution are permeating and pervasive in relation to this Court's characterization in *Paul v. Davis, supra*, 424 U.S. at 713, of plaintiff's privacy claim in that case:

> constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the state's ability to restrict his freedom of action in a sphere contended to be 'private', but instead on a claim that the state may not publicize a record of an official act such as an arrest.

The pursuit of a prosecution implicates interests protected by the Constitution. *Brinegar, supra; Jackson v. Virginia, supra; Klopfer v. North Carolina, supra.* If the prosecution is objectively unreasonable, it is, *ipso facto*, an abuse of governmental power in Fourth, Sixth and Fourteenth Amendment terms as it would be "at best a waste of judicial resources"; "at worst . . . [a cause of] injur[y] [to] the innocent. . . . " *Malley v. Briggs, supra*, 475 U.S. at 343-44; *Jackson v. Virginia, supra; Klopfer v. North Carolina, supra.* It is the employment of that power as an "instrument of oppression". *Malley, supra; Davidson v. Cannon, supra* at 348; *Daniels v. Williams, supra* at 331; *DeShaney,*

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causation would exist because, "§1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' " *Malley v. Briggs, supra*, 475 U.S. at 344 n. 7, quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Accordingly, "since the common law recognized the causal link between the submission of a complaint and an ensuing [prosecution], [this Court reads] § 1983 as recognizing the same causal link." *Malley, supra* at 344 n.7; *White v. Frank*, 855 F.2d 956, 959 and n.2 (2nd Cir. 1988).

supra, 489 U.S. at 196.[18] Accordingly, an objectively unreasonable prosecution should be recognized as actionable under §1983.

C.

THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, IS LIKELY TO RECUR, AND, THEREFORE, SHOULD BE SETTLED BY THIS COURT.

The observations, quoted above, of Justice White, of Judge Jones and of Judge Posner demonstrate that the question presented in this case is one which is unsatisfactorily festering in the Circuits. The frequency with which the issue has been presented indicates that it will recur

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[18] An objectively unreasonable prosecution is certainly as abusive of power as other types of conduct under color of state law recognized as actionable under §1983 by the Circuits: *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir. 1990) (cause of action where violence to decedents " . . . was . . . the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available . . . [thereby] increasing the vulnerability of decedents . . . "); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (§1983 cause of action where a woman traveling in car impounded by state trooper was left to find her way home and was raped); *Cornelius v. Highland Lake*, 880 F.2d 348 (11th Cir. 1989) (§1983 plaintiff not subject to summary judgment where she was abducted and held hostage for three days by inmate laborers who escaped from a state supervised work project); *Gregory v. City of Rogers*, 921 F.2d 750, 752-57 (8th Cir. 1990) (cause of action where police arrested and detained sober designated driver leaving intoxicated passengers to fend for themselves resulting in accident and injury).

with frequency.[19] When it does, unless this Court has provided guidance, it will continue to spawn a diversity of conflicting judicial approaches. Whether and, if so, the extent to which victims of objectively unreasonable prosecutions have a §1983 cause of action will depend upon geography. That is an inappropriate criterion. The issue presented in this Petition is, therefore, ripe for and requires this Court's resolution.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[19] Another case, *City of Manhattan Beach v. Buckey*, No. 92-560, is now before this Court on Petition for Certiorari raising *inter alia* the question "whether malicious prosecution constitutes a violation of due process for purpose of a § 1983 cause of action even where all procedural requirements of due process have been met". The Petition in *Buckey*, seeking review of the Ninth Circuit's judgment in *Buckey v. County of Los Angeles*, 957 F.2d 652 (9th Cir. 1992), amended 968 F.2d 791 (9th Cir. 1992), covers some of the same ground presented in this Petition. Cf. *Cerbone v. Conway*, 479 U.S. 84 (1986) (writ of certiorari dismissed as improvidently granted).

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 91-3746
KEVIN ALBRIGHT,

Plaintiff-Appellant,

v.

ROGER OLIVER, individually and in his official capacity as a police detective with the City if Macomb, Illinois, and CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
*No. 90 C 1221 – **Michael M. Mihm,** Chief Judge.*

ARGUED MAY 20, 1992 – DECIDED SEPTEMBER 14, 1992

Before BAUER, *Chief Judge*, POSNER, *Circuit Judge*, and GIBSON, *Senior Circuit Judge.**

POSNER, Circuit Judge. The district judge granted the defendants' motion to dismiss the complaint in this constitutional tort case (brought under 42 U.S.C. § 1983) for failure to state a claim, so we take the facts to be as

* Hon. Floyd R. Gibson of the Eighth Circuit, sitting by designation.

alleged in the complaint, without of course vouching for their truth. The plaintiff is Kevin Albright. The defendants are Roger Oliver, an experienced police detective employed by the City of Macomb, Illinois, the home of Western Illinois University; and the City itself. In March 1987 Oliver hired a cocaine addict, Veda Moore, as an informant. She had come to him seeking protection from a drug dealer who was threatening her because she owed him money. Oliver insisted that she work for him as an undercover informant, in exchange for which he promised her his protection and some pay. Her job for Oliver was to buy cocaine and report the sellers to him. She used the money that he paid her for this information to buy cocaine for her own consumption.

In June she reported having bought cocaine from John Albright, Jr. at a hotel room in Macomb. She turned over the "cocaine" to Oliver; it turned out to be baking soda. Without further investigation, Oliver testified about the transaction before a state grand jury, which returned an indictment against John Albright, Jr. for sale of a "look alike" (alike to an illegal drug, that is) substance in violation of Ill. Rev. Stat. ch. 56½, ¶ 1404(b). Oliver then went to John Albright, Jr.'s home to arrest him, but found that Albright was an elderly, respectable, inoffensive gentleman unlikely to have committed the offense of which Veda Moore had accused him. But in response to Oliver's question did Albright have any sons Albright told him that maybe Oliver was looking for his son John David Albright. So Oliver altered the name on the arrest warrant to John David Albright and went to arrest him – only to discover that he had been in Chicago at the time of the alleged offense.

There was another son, Kevin Albright, a senior at Western Illinois University. Oliver called Moore and asked her whether the man from whom she had bought the baking soda might be Kevin Albright. She said it was he all right. A criminal information was issued charging Kevin Albright with the offense, followed (on October 16, 1987) by an arrest warrant. Learning of the warrant, Kevin Albright turned himself in, acknowledging to Oliver that he had been in Macomb on the date of the alleged offense but denying any involvement in drug trafficking. He was booked and required to post bond; one (mandatory) condition of bond was that he not leave the state without the court's permission. Ill. Rev. Stat. ch. 38 ¶ 110-10(a)(3). At the preliminary hearing, held on January 5, 1988, Oliver testified about Veda Moore's information without however revealing his initial efforts against the other two Albrights, and the judge found probable cause to make Kevin Albright stand trial. But on June 27, before the trial could be held, the circuit court dismissed the information against Kevin Albright on the ground that it failed to state an offense under Illinois law. (We do not know why not; we have not been able to find a copy of the decision.) The prosecution had received media coverage. And Albright had missed a job interview in St. Louis – he says because of the prohibition against his leaving the state, although he did not request the court's permission to leave, as he could have done under the terms of the bond.

The present suit was brought one day short of two years after the dismissal of the prosecution. The complaint states a plausible claim for false arrest. It is true that Kevin Albright was not arrested in the conventional

sense – he turned himself in. But it is enough that he was booked; that was a seizure of his person within the meaning of the Fourth Amendment. *Voytko v. Ramada Inn of Atlantic City*, 445 F. Supp. 315, 320, 324 (D.N.J. 1978). And probably the "arrest" lacked probable cause. Detective Oliver made no effort to corroborate Veda Moore's unsubstantiated accusation. A heap of baking soda was no corroboration. Her initial misidentification of the seller cast grave doubt on the accuracy of her information. And this was part of a pattern: of fifty persons she reported to Oliver as trafficking in drugs, none was successfully prosecuted for any crime. In the case of "Albright," Oliver should have suspected that Moore had bought cocaine either from she knew not whom or from someone she was afraid to snitch on (remember that she had gone to work for Oliver in the first place because she was being threatened by a man to whom she owed money for previous purchases of cocaine), that she had consumed it and replaced it with baking soda, and that she had then picked a name from the phone book at random. The fact that she used her informant's reward to buy cocaine makes this hypothesis all the more plausible. An arrest is a serious business. To arrest a person on the scanty grounds that are alleged to be all that Oliver had to go on is shocking. The limits of reasonable police conduct, illistrated by our recent decision in *Davis v. Owens*, No. 91-2673 (7th Cir. Aug. 26, 1992), may well have been exceeded here – always assuming that the facts alleged in the complaint are true.

But Kevin Albright filed his suit more than two years after his arrest, so his constitutional claim of false arrest was barred by the statute of limitations. *Wilson v. Garcia*,

471 U.S. 261, 276 (1985); Ill. Rev. Stat. 1991, ch. 110, § 13-202. He has therefore had to base this suit on the events after the arrest, that is, on the prosecution itself, which ended on June 27, 1988, when the charges against him were dropped, and which he characterizes as malicious. He contends that malicious prosecution is, or at least in particular circumstances can be, a constitutional tort.

As noted in *Brummett v. Camble*, 946 F.2d 1178, 1180 n. 2 (5th Cir. 1991), this is a question on which there is an embarrassing diversity of judicial opinion. The Supreme Court has not opined on the question, but its decision in *Paul v. Davis*, 424 U.S. 693 (1976), holding that defamation by a public officer is not a constitutional tort, provides a clue to the answer that the Court is likely to give if it ever agrees to review a case that presents the question. The Court could have equated reputation to property and held that a tortious injury to reputation is analytically the same as a conversion of property, which is actionable in a civil rights suit if done intentionally by a state officer. *Kimbrough v. O'Neil*, 545 F.2d 1059 (7th Cir. 1976) (en banc); *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984); *Bayron v. Trudeau*, 702 F.2d 43, 45 and n. 2 (2d Cir. 1983). It declined to make this equation. It did not want to draw the whole body of public-officer state law into the federal courts in the name of civil rights. Malicious prosecution, whether civil or criminal, resembles defamation. It is a deliberate accusation of wrongdoing calculated to embarrass the defendant, disrupt his activities, and put him to the expense of defending himself. Since a malicious prosecution is by definition groundless, it does not impose punishment costs, not usually anyway. In the end the

defendant is exonerated, though the end may come after punishment had been imposed or commenced, for example if the prosecution had been founded on forged documents not exposed till after the defendant had been convicted and imprisoned, as was alleged to be the case in *King v. Goldsmith*, 897 F.2d 885 (7th Cir. 1990). The medley of harms that a malicious prosecution inflicts when, as in this case, the defendant is exonerated before any punishment is imposed – indeed before he is even put on trial – is similar to that inflicted by defamation, which by impairing a person's reputation not only embarrasses and even outrages him but also undermines his ability to make favorable transactions, whether business or personal, thereby subjecting him to costs pecuniary or nonpecuniary or both. It also puts him to costs pecuniary or nonpecuniary or both. It also puts him to the expense of bringing a suit for defamation to recover his good name. If the injuries that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes.

But like defamation, malicious prosecution can be a component of a constitutional tort. Defamation accompanying a discharge from employment can make it impossible for a person to obtain equivalent employment elsewhere, thus depriving him of liberty of occupation, one of the liberties protected by the due process clause. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976); *Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987); *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136 (7th Cir. 1984). In this example the concept of liberty is used to make

constitutional tort liability for defamation by public officers narrower than common law liability. The same analytical process is available to deal with the parallel case of malicious prosecution. Malicious prosecution can result in a person's being thrown into jail to await trial, and incarceration is of course no less a deprivation of liberty within the meaning of the due process clause than exclusion from an occupation. *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Villanova v. Abrams*, No. 89-3146, slip op. at 7-8 (Aug. 13, 1992). But Kevin Albright, though a recipient of unfavorable media publicity, does not contend that he is either unemployable as a result of his prosecution or that he was put in jail or even forced to stand trial. And he does not argue that being required to appear for a probable cause hearing is the equivalent of incarceration.

He was, it is true, "confined" to Illinois; and if Denmark was a dungeon to Hamlet (as the latter claimed), we suppose Illinois could be a prison to Kevin Albright. The tort of false imprisonment does not require close confinement. *Robinson & Co. v. Green*, 148 Ala. 434, 43 So. 797 (1906); *Restatement (Second) of Torts* § 36, comment b (1965). The "prison" could indeed be as large as an entire state. *Id.*, § 36, illustration 7. But constitutional torts do not follow the exact contours of their common law counterparts. The element of confinement was further attenuated here by the fact that Albright could leave Illinois if he obtained leave of court. As he did not feel sufficiently restive, notwithstanding the possibility of a job interview across the state line in St. Louis, to request that leave, we do not think he was "confined" to the point of being deprived of constitutional liberty. If you close a person in

the room but the person has a key (and knows it), you have not committed false imprisonment. *Lopez v. Winchell's Donut House*, 126 Ill. App. 3d 46, 466 N.E.2d 1309 (1984); Restatement, *supra*, § 36(2), and comment a and illustration 1. *A fortiori* you have not deprived him of his constitutional liberty. The analogy is not exact, but suppose you told a person that you had locked the door but would open it as soon as he wanted to leave, provided he asked for it politely – and he never asked, or made any motion to leave. Would *that* be false imprisonment? Who knows? But it would not be a sufficient deprivation of liberty to actuate constitutional remedies. Quite apart from *Paul v. Davis*, the courts have declined to equate every infringement of an interest protected at common law to a deprivation of a constitutionally protected liberty. *Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992); *Cameron v. Internal Revenue Service*, 773 F.2d 126, 129 (7th Cir. 1985); *Davis v. Forrest*, 768 F.2d 257, 258 (8th Cir. 1985); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.).

In cases such as these the concept of constitutional "liberty" is used as a gatekeeper to limit access to the federal courts by persons complaining of the pettier sort of official outrage. Liberty so conceived has a qualitative as well as a quantitative dimension. The State of Illinois could not impose a criminal sentence on Albright without according him due process of law, even if the sentence were merely that he remain in Illinois for a time unless he got a judge's permission to leave. But a similarly modest infringement of liberty is not actionable when, being merely a by-product or some less ominous form of public coercion than the imposition of criminal punishment, it is

farther from the core of constitutionally protected liberty. We do not place malicious prosecution in the class of trifling infringements of the right to be free from oppression by public officers; but in the absence of incarceration or other palpable consequences we do not think it should be actionable as a constitutional wrong. In a case such as this, where the prosecution collapses before trial, just as in the garden-variety public officer defamation case that does not result in exclusion from an occupation, state tort remedies should be adequate and the heavy weaponry of constitutional litigation can be left at rest. The multiplication of remedies for identical wrongs, while gratifying for plaintiffs and their lawyers, is not always in the best interest of the legal system or the nation.

Albright's energetic and tenacious counsel seeks to escape the conclusion that malicious prosecution is not actionable as a constitutional tort by pointing out that the Supreme Court has recognized a constitutional right to travel of which, he argues, the conditions in the bond deprived his client, E.g., *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974). He does not, of course, suggest that courts which impose travel restrictions on persons awaiting trial for criminal offenses, or which jail them pending trial because they can't make bail or are regarded as a flight risk or a menace to the community, are engaged in wholesale violations of the right. *United States v. Lockett*, 526 F.2d 1110, 1112 (7th Cir. 1975). As a flight risk is the most eager of travelers, such a proposition would be extravagant even by the elastic standards of constitutional argumentation. The argument rather is that detective Oliver caused Albright to lose his freedom of travel by setting

the prosecution in motion without (whatever the judge at the preliminary hearing said – he wasn't given a full picture) probable cause to believe that Albright had actually committed a drug offense.

If Oliver had been trying to confine Albright to Illinois, Albright might have an argument based on cases such as *Kent v. Dulles* that involve the denial of passports to Americans wanting to travel abroad. It would not be a strong argument. Not because *Regan v. Wald*, 468 U.S. 222, 240-42 (1984), confines the passport cases to First Amendment situations, where a passport is denied to persons on the basis of their beliefs; for *Regan* still requires that *some* justification be shown for limiting the right to travel, conceived of as a right conferred by the due process clause, even if the First Amendment is not involved. There was no justification here, if the prosecution was malicious. But we do not understand Albright to be arguing that Oliver intended to curtail his right to travel, though this was a foreseeable incident of the prosecution. More important, it is not clear that the right was materially curtailed, given the terms of the bond.

We said earlier that the due process phase of the case would be different if Albright had been incarcerated, and he would have been had he not posted bond – so should the cost of the bond ($350 – 10 percent of the face amount of the bond) be considered a substitute deprivation? If jail deprives a defendant of liberty, shouldn't money in lieu of jail deprive him of property? Well, but bond money is refundable if the defendant does not violate the terms of the bond. Had Albright posted the full bond ($3500) he would have gotten it back, but instead he chose to pay a nonrefundable fee of $350 in lieu of bond. Such a fee

should be treated no differently from attorney's fees. It was an incidental expense of a lawsuit that terminated in his favor. Obviously the expense of the fees that the plaintiff in a defamation case incurs is not a deprivation of property that enables him to bring suit against the public officer who defamed him. That would undo *Paul v. Davis*. No more should it be the shoehorn that squeezes malicious prosecution into the due process clause. *Easter House v. Felder*, 910 F.2d 1387, 1407 (7th Cir. 1890) (en banc).

Albright next argues that the prosecution denied him the equal protection of the laws. He does not claim to have been singled out for prosecution because he was black or a member of some other minority, but he points out that a class with only one member can still complain of discrimination against his tiny class. *United States v. Falk*, 479 F.2d 616, 619 (7th Cir. 1973) (en banc); *Falls v. Town of Dyer*, 875 F.2d 146 F.2d 146 (7th Cir. 1989). Indeed, one might suppose that the smaller the class, the less able it would be to protect itself in the political arena, and therefore the greater the danger that it might be singled out for oppression. But you must be singled out because of your membership in the class, and not just be the random victim of governmental incompetence. To close the question left open in *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992), we hold that "the state's act of singling out an individual for differential treatment" does *not* "itself create the class." That would make every selective prosecution, and indeed every arbitrary act of government, a violation of the Constitution.

Even if, as Albright suggests, the class of innocent persons could be regarded as a protected group for purposes of the equal protection clause (an implausible suggestion, for while we are not a law-abiding society, the innocent are not yet an oppressed minority among us), no one supposes that Oliver went after Albright *because* Albright was innocent. At worst, Oliver failed to discriminate carefully between the probably guilty and the probably innocent. It is not suggested that he has a perverse desire to punish the innocent and leave the guilty alone. Or that he has it in for anyone named Albright.

There are some other issues and arguments but they need not be discussed. The case was properly dismissed.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

KEVIN ALBRIGHT, Plaintiff, v. ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation, and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation, Defendants.	)	Case No. 90-1221

ORDER

(Filed Sep 30 1991)

Before the Court is the Defendants' Motion to Dismiss (#23) and the Plaintiff's Motion to Amend the Second Amended Complaint (#27). For the reasons set forth below, the Defendants' Motion to Dismiss is granted in part and denied in part, and the Plaintiff's Motion to Amend is granted.

Background

The Complaint alleges the following facts, which this Court assumes are true in the context of a Motion to Dismiss. The Defendant Roger Oliver ("Oliver") has been a detective in the police department of the Defendant City of Macomb, Illinois ("City") for the past two

decades. In March of 1987, Oliver hired a woman named Veda Moore as a paid informant to assist in undercover drug operations. Moore had a history of drug usage herself.

On June 17, 1987, Moore reported to Oliver that she had purchased cocaine from a man named John Albright, Jr., and that the transaction had taken place at a hotel in Macomb. Oliver submitted the substance which Moore had purchased on that occasion for lab analysis and learned that it was baking powder, not cocaine. Nonetheless, on September 10, 1987, Oliver testified before a McDonough County Grand Jury, and the Grand Jury returned an indictment against John Albright, Jr. for the sale of a "look alike" substance. Oliver then went to the home of John Albright, Jr. in Macomb to execute the arrest warrant, only to learn the John Albright, Jr. was a man in his sixties and not likely to be the person who sold the substance to Veda Moore on June 17. Mr. Albright suggested to Oliver that perhaps he was looking for John David Albright, one of his sons.

Oliver altered the arrest warrant to read John David Albright instead of John Albright, Jr. However, John David Albright was not the right man either. He had been living in Chicago for the previous year, including the day on which Moore purchased the baking powder. John David Albright somehow learned that an arrest warrant had been issued against him, so he traveled to Macomb to clear things up. He explained to Oliver that he had been living and working in Chicago and thus could not be the one Oliver was looking for. Oliver then surmised that his true target was actually the Plaintiff Kevin Albright, John David Albright's brother. Oliver called Veda Moore and

asked her if the person from whom she purchased the baking powder could have been Kevin Albright. Moore confirmed that it was actually Kevin Albright.

On October 16, 1987, a criminal information was then issued against Kevin Albright for the sale of a "look alike" substance, and on October 19, 1987, an arrest warrant was issued for him.

Kevin Albright turned himself in and on January 5, 1988, a preliminary hearing was held. The circuit court found probable cause and bound Kevin Albright (herinafter[sic] "Albright") over for trial. However, on June 27, 1988, the circuit court dismissed the information against Kevin Albright on the grounds that it did not state an offense under Illinois law.

Just one day shy of two years later, Albright filed this civil action against the City and Oliver, alleging that they had violated his constitutional rights and committed various common law torts by bringing a baseless prosecution against him. Count I is a §1983 malicious prosecution claim against the City and Oliver in his official capacity. Count II is a §1983 malicious prosecution claim against Oliver in his individual capacity. Count III is a common law malicious prosecution claim against Oliver. Finally, Count IV is a common law false light invasion of privacy claim against Oliver.

Oliver and the City now move to dismiss all claims against them. They argue that Albright's §1983 claims were untimely filed, that those claims fail to state a proper claim upon which relief can be granted, and further that Oliver possesses qualified immunity from those claims. The Defendants also argue that the common law

false light invasion of privacy claim is barred by the statute of limitations. Finally, the Defendants argue that, if the federal claims are dismissed, Count III should be dismissed for lack of subject matter jurisdiction. The Magistrate considered the Motion to Dismiss and recommended that Counts I, II, and IV be dismissed as time-barred, but that Count III should remain because jurisdiction could be premised upon diversity. Both sides have filed objections to the Magistrate's recommendation.

DISCUSSION

I. Statute of Limitations

The Magistrate recommended that Count IV be dismissed as time-barred, given that the applicable statute of limitations for this action is one year under Ill.Rev.Stat. ch. 110, 13-201. In his objection to the Magistrate's recommendation, Albright apparently concedes that Count IV is time-barred because he does not contest the finding that the statute of limitations for this claim is one year or that his cause of action accrued more than one year before he filed suit. Accordingly, this Court adopts the Magistrate's recommendation on this point and hereby dismisses Count IV.

The Magistrate also suggested that Counts I and II, the §1983 malicious prosecution claims, were time-barred. The Magistrate noted that the statute of limitations in Illinois for §1983 claims is two years, see *Kalimara v. Illinois Department of Corrections*, 879 F.2d 279 (7th Cir. 1989), and found that all of the events about which Albright complained occurred more than two years before he filed suit on June 26, 1990. The only event which

occurred during the two years preceding this date was the Illinois circuit court's dismissal of the criminal charges against Albright. The Magistrate found that Albright's cause of action accrued before this date and this his §1983 claims were therefore time-barred. Albright objects to this finding. The question then is when does a §1983 malicious prosecution claim accrue?

This Court recently had an opportunity to address this issue in *Davis v. Union National Bank, et al*, Case No. 90-1067 (C.D. Ill., July 9, 1991). In that case, this Court first noted that the Seventh Circuit, while clearly holding that §1983 malicious prosecution claims were viable provided that they alleged constitutional deprivations, has not indicated when such causes of action accrued for purposes of the statute of limitations. In the absence of Seventh Circuit authority, this Court turned to other jurisdictions for guidance and concluded that a §1983 malicious prosecution claim accrues when the prosecution terminates in favor of the defendant. *See Davis*, slip op. at pp. 5-7; *Rose v. Bartle*, 871 F.2d 331, 348-49 (3rd Cir. 1989); *Robinson v. Maruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990). The *Davis* case is currently on appeal to the Seventh Circuit, and perhaps that Court will find otherwise. Until such time, however, this Court's view regarding the accrual date for §1983 malicious prosecution claims remains the same, and Albright's June 26, 1990 filing was timely given that his cause of action accrued on June 27, 1988. Accordingly, this Court rejects the Magistrate's recommendation on this point and declines to dismiss Counts I and II on the basis that they were untimely filed.

II. Failure to State a Proper Claim

Because he found that Albright's §1983 claims were untimely filed, the Magistrate did not address the issue, raised by Defendants in their Motion to Dismiss, of whether Albright's civil rights counts failed to state a proper claim for relief. This Court now finds that they do fail to state a valid claim and that they should therefore be dismissed.

Counts I and II each state §1983 malicious prosecution claims – one is directed against the City and Oliver in his official capacity and the other is directly solely against Oliver in his individual capacity. While the law may vary in other jurisdictions, in this circuit the law is that a §1983 malicious prosecution claim is cognizable, provided that the Plaintiff alleges deprivations of a constitutional magnitude. *Easterhouse v. Felder*, 910 F.2d 1387, 1407 (7th Cir. 1990); *Hampton v. Hanrahan*, 600 F.2d 600, 630 (7th Cir. 1979). However, the common law tort of malicious prosecution is itself insufficient to create a civil rights claim and so a §1984 malicious prosecution claim must do more than allege the elements of a common law malicious prosecution action. *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985). Albright does not argue that the law is otherwise.

An allegation that a criminal defendant was charged without a prior determination of probable cause will not create a §1983 malicious prosecution claim, because there is no constitutional guarantee to such a finding prior to being criminally charged. *See Gerstein v. Pugh*, 420 U.S. 103, 125 n. 26 (1975). This is why merely alleging a common law malicious prosecution claim, which includes

as an element that the defendant was charged without probable cause (*see Frye v. O'Neill*, 166 Ill.App.3d 963, 975 (4th Cir. 1988)) is insufficient to state a §1983 malicious prosecution claim. *See Friedman*, 763 F.2d at 239. Albright does suggest that the law should be, and perhaps is, otherwise. *See* Plaintiff's Response to Defendants' Motion to Dismiss at p. 5, n. 4. This Court does not agree. A §1983 malicious prosecution claim must do more than allege that the plaintiff was charged in a criminal case without probable cause. Thus, Albright's allegations that Oliver investigated him and caused him to be charged while knowing that there was no probable cause to believe he had committed a crime, while adequate to support a common law malicious prosecution claim, do not support his §1983 malicious prosecution claims. Albright must point to some other distinct constitutional deprivation to maintain these counts.

In response to this challenge, Albright asserts three constitutional rights which suffered under the Defendants' actions. First on the list is his right to interstate travel. Albright asserts that as a result of the criminal charge against him, he was placed on bond with restrictions on his ability to travel out of state -- he would first have to seek permission of the court. Albright cites Supreme Court authority for the proposition that the right to travel is a fundamental constitutional right, and concludes that because that right was restrained, he suffered constitutional deprivations as a result of the Defendants' malicious prosecution.

There is no doubt that the constitution secures to individuals the right to freedom of movement. However, that right is not absolute – it may be compromised or

even forfeited by an individual's action. In discussing this notion in *Gerstein*, the Supreme Court stated:

> Even pretrial release may be accompanied by burdensome conditions that affect a significant restraint of liberty . . . Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

420 U.S. at 114 (citation omitted). In other words, an individual may by his own conduct lose his right to unrestricted movement, and such a forfeiture is only unconstitutional if the individual has not been afforded a proper judicial determination that his confinement is warranted. Thus, there is no constitutional deprivation of the right to interstate travel when a convicted felon is sentenced to incarceration. Similarly, there is no constitutional deprivation when a criminal defendant, who has been afforded a probable cause hearing, is subject to travel restrictions on his bond. Accordingly, Albright's assertion that he was deprived of his right to interstate travel is insufficient to state a constitutional deprivation in support of his §1983 claim.

Albright next asserts that his equal protection rights were violated by the unfounded charges against him. Albright argues that, by charging him with an offense while knowing there was no probable cause to believe he had committed such a crime, while at the same time refraining from charging Veda Moore, an admitted cocaine user, the Defendants were enforcing the criminal laws in an unequal fashion. Albright suggests that he is "a member of a class of innocent persons," that Veda Moore is in a class of guilty persons, and the disparate treatment of the

two in this instance smacks of an equal protection violation.

In support of this argument, Albright cites *Wayte v. United States*, 470 U.S. 598 (1985) and *Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989). In *Wayte*, the Supreme Court held that government cannot selectively enforce its criminal laws based upon unconstitutional classifications such as race, religion, or exercise of first amendment rights to free speech. 470 U.S. at 608. In *Falls*, the Seventh Circuit held that in addition to such types of improperly motivated selective prosecutions, it is also unconstitutional for government to selectively enforce its laws upon a single individual, either by formal declaration or informal policy. 875 F.2d at 148-49. Such would be unconstitutional as a bill of attainder. *Id.* at 149. Thus, these cases stand for the proposition that selective prosecution based upon unconstitutional classifications such as race or religion, and selective prosecutions against a single individual which amount to a bill of attainder, are unconstitutional and therefore can provide the basis of a civil rights action.

Albright's complaint does not satisfy these tests. Albright does not allege that he was prosecuted because of his membership in a suspect class, nor does he suggest that he was singled out for a baseless prosecution just because he was Kevin Albright. Instead, Albright alleges simply that he was prosecuted and should not have been – that he was in a class of innocent persons. As noted by the Defendants in their reply memorandum at p. 7:

> In the present case, Plaintiff does not allege (nor could he) that the Defendants sought to have him prosecuted specifically because he was an

> innocent person or a member of a class of innocent people. Rather, he claims only that the Defendants' use of flawed law enforcement techniques had the effect of causing innocent persons to be prosecuted, while the guilty went free. Under the authority cited in Plaintiff's response memoranda, however, discriminatory effect is not enough; equal protection claims require discriminatory design or purpose.

(Citation omitted). This Court agrees and finds that Albright's Complaint does not allege an underlying equal protection claim as a predicate to the §1983 malicious prosecution action.

Albright's final argument of a constitutional deprivation proves to be even more elusive. Albright asserts that by wrongfully prosecuting him, the Defendants created a "deprivation of [his] substantive due process right to be free from encroachments on liberty created by reckless state conduct." Albright argues that, by utilizing the services of an inherently unreliable informant, the state recklessly placed him in peril of being unjustly accused of wrongdoing, and consequently it had an affirmative duty under due process principles to use extra caution in charging him so as to protect him from this danger. In support of this proposition, Albright cites *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988), which adapted a tort principle to the due process clause and held that the constitution requires that a state provide affirmative assistance of someone it had previously placed in danger. 847 F.2d at 1220-23. In this Court's view, this doctrine is inapplicable to the present case and cannot afford the predicate constitutional deprivation for Albright's §1983 claims.

As noted by the Defendants in their response to the Plaintiff's supplemental memorandum at pp 2-3:

> Though Plaintiff advances a game effort to slip under the umbrella of *Archie*, this case has nothing in common with either *Archie* or any other case cited by Plaintiff dealing with civil rights liability for failing to provide public services.
>
> In *Archie*, as well as *White v. Rochford* and *DeShaney v. Winnebago County*, the injury was not directly inflicted by the state, but by a third party or by no party at all. Specifically, in *DeShaney*, the plaintiff was beaten by an abusive parent, and the state chaige with failing to prevent the beating. *DeShaney v. Winnebago County*, 489 U.S. 189 (1989). In *White*, two children were abducted by a third party after having been left unattended in a car on a highway after the police had arrested the adult driver of the car. *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). In *Archie*, the plaintiff became sick on her own and charged the City of Racine with failing to provide medical services in response to the plaintiff's request for assistance. *See also Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1975) (failing to protect wife of undercover narcotics officer from retaliation by underworld figures), *cert. denied*, 89 L.Ed. 2d 574 (1986); *Beard v. O'Neil*, 728 F.2d 894 (7th Cir.) (FBI informant's failure to protect plaintiff from contract murder perpetrated by Chicago police officer), *cert. denied*, 469 U.S. 825 (1984); *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (failure to protect occupants in a burning car), *cert. denied*, 465 U.S. 1049 (1984). In all these cases, the defendants were charged with failing to provide essential public

services, rather than wrongfully wielding the affirmative power of the state.

This Court agrees and finds that the Plaintiff's substantive due process allegation is insufficient to create the constitutional deprivation required for a viable §1983 malicious prosecution claim.

While Albright's Complaint adequately alleges facts to support a common law malicious prosecution claim, it does not, on the facts presented, establish a constitutional deprivation, which is essential to a viable §1983 malicious prosecution claim. Accordingly, this Court dismisses Counts I and II for failure to state a proper claim for relief.

III. Qualified Immunity

Oliver is also entitled to dismissal of the §1983 claims against him because he is entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) . The doctrine of qualified immunity provides that public officials performing discretionary functions are immune to suits for damages unless the conduct which created the action amounted to a clear constitutional deprivation. *Doe v. Bobbit*, 881 F.2d 510, 511 (7th Cir. 1989) (citing *Harlow*, 457 U.S. at 818). As just discussed, in this Court's view Oliver's conduct did not even amount to a constitutional deprivation. However, to whatever extent that Oliver's conduct could be said to be unconstitutional as suggested by Albright, such would not create a violation of "clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, 457 U.S. at 818, and thus Oliver would possess immunity.

IV. Policy or Custom

An additional ground for dismissing Count I as it relates to the City is that it fails to sufficiently allege that any constitutional deprivation was the result of a policy or custom of the City. Albright's Complaint alleges that the constitutional deprivations imposed upon him resulted from Oliver's unchecked investigative activities and because the City clothed Oliver with discretion to conduct investigative operations as he saw fit. Albright argues that this constitutes a custom or policy under *Penbaur v. City of Cincinnati, et al.*, 475 U.S. 469 (1986). This Court disagrees.

In *St. Louis v. Praprotinik*, 485 U.S. 112 (1988), the Supreme Court held that, in the case of a subordinate who is not empowered to make policy, but merely is authorized to implement or execute that policy, an individual's actions which run afoul of constitutional protections do not constitute the policy of the municipality. 485 U.S. at 130. In this case, Albright has not alleged that Oliver had policy-making authority in the context of how to investigate suspects. Under the facts alleged, he may have had discretion about how to conduct criminal investigations on a case-by-case basis, but he did not have the authority to set policy on a city-wide basis as to how such investigations would be conducted. These facts do not allege a municipal policy. *See City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985). To hold that Oliver's actions in this case could create corresponding liability for the City would be to permit respondeat superior liability, which was expressly precluded in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

V. Common Law Claim for Malicious Prosecution

While Albright does not possess a civil rights action under the facts alleged, he does possess a common law malicious prosecution claim. Further, although the federal claims are now dismissed, his claim can appropriately remain within this court's jurisdiction under diversity. Accordingly, Albright's Motion to Amend the Second Amended Complaint to include allegations of diversity of citizenship is hereby granted, and this Court retains jurisdiction over Count III on that basis.

CONCLUSION

For the reasons set forth above, the Defendants' Motion to Dismiss (#23) is GRANTED in part and DENIED in part and the Plaintiff's Motion to amend (#27) is GRANTED and the Defendants are ordered to answer Count III within 21 days of the entry date of this Order.

ENTERED this 30th day of September, 1991.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: September 14, 1992

BEFORE: **Honorable** William J. Bauer, Chief Judge

Honorable Richard A. Posner, Circuit Judge

Honorable Floyd R. Gibson, Senior Circuit Judge*

No. 91-3746

KEVIN ALBRIGHT,
Plaintiff - Appellant

v.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation, and CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,
Defendants - Appellees

Appeal from the United States District Court for the Central District of Illinois, Peoria Division
No. 90 C 1221, Chief Judge Michael M. Mihm

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

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* Hon. Floyd R. Gibson of the Eighth Circuit is sitting by designation.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered this date.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

KEVIN ALBRIGHT, Plaintiff, vs. ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation, Defendants.	)	No. 90-1221 **ORDER** (Filed Nov. 25, 1991)

THIS MATTER COMING ON BEFORE THE COURT on the Stipulation of the parties to the effect that Count III of plaintiff's Second Amended Complaint in the above captioned matter may be dismissed without prejudice pursuant to Rule 41(a)(1)(ii), Fed.R.Civ.P. and the court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that Count III of plaintiff's Second Amended Complaint in the above captioned matter be and is hereby dismissed without prejudice;

IT IS FURTHER ORDERED that nothing in this order shall preclude the defendants from raising any defense they had prior to the entry of this order;

IT IS FURTHER ORDERED that the parties shall pay their respective costs.

DONE IN OPEN COURT THIS 25th day of November, 1991.

BY THE COURT:

/s/ Michael M. Mihm
MICHAEL M. MIHM, JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

KEVIN ALBRIGHT, Plaintiff, vs. ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation, Defendants.	)	No. 90-1221 **ORDER** (Filed Nov. 25, 1991)

THIS MATTER COMING ON BEFORE THE COURT on the Stipulation of the parties to the effect that the court may grant plaintiff leave to file a (Substituted MMM) Third Amended Complaint and that once filed, the court may consider that all motions and memoranda previously filed by the defendants directed against the earlier complaints shall apply with equal force and effect to the Third Amended Complaint and to the further effect that the court's order of September 30, 1991, dismissing Counts I and II of the plaintiff's earlier complaints shall apply with equal force to Counts I and II of the Third Amended Complaint, and the court having reviewed Counts I and II of the Third Amended Complaint and having concluded that its order of September 30, 1991, directed to Counts I and II of the earlier complaints

would apply with equal force and effect to Counts I and II of the plaintiff's Third Amended Complaint, and the court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that plaintiff be and is hereby granted leave to filed a Third Amended Complaint;

IT IS FURTHER ORDERED that defendants' motions directed to Counts I and II of the previous complaints be and hereby are deemed to apply with full force and effect to Counts I and II of plaintiff's Third Amended Complaint;

IT IS FURTHER ORDERED that this court's order of September 30, 1991, dismissing Counts I and II of the previous complaints shall apply with equal force and effect to Counts I and II of plaintiff's Third Amended Complaint and said order shall have operative effect after plaintiff's Third Amended Complaint is deemed filed upon and after the entry of this order.

IT IS FURTHER ORDERED that the court having ordered Count III of plaintiff's complaint dismissed without prejudice pursuant to Rule 41(a)(1)(ii), this matter is ready for final judgment;

IT IS, THEREFORE, ORDERED that the clerk be and is hereby directed to enter final judgment pursuant to Rule 58 in favor of the defendants and against the plaintiff.

DONE IN OPEN COURT THIS 25th day of November, 1991.

BY THE COURT:

/s/ Michael M. Mihm
MICHAEL M. MIHM, JUDGE

APPENDIX F

United States District Court

CENTRAL DISTRICT OF ILLINOIS

KEVIN ALBRIGHT,

Plaintiff,

vs.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, IL, an IL Municipal Corporation; MACOMB, ILLINOIS THE CITY OF, an Illinois Municipal Corporation,

Defendants.

JUDGMENT IN A CIVIL CASE

(Filed Nov. 26, 1991)

CASE NUMBER: No. 90-1221

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Count III is dismissed without prejudice pursuant to Rule 41(a)(1)(ii); as to Counts I and II, judgment is entered in favor of defendants and against plaintiff. Parties are to bear their own costs.

/s/ MMM

/s/ Veronica L. Firguson
(By) Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

KEVIN ALBRIGHT,

Plaintiff,

vs.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Defendants.

) No. 90-1221
)
) SUBSTITUTED
) THIRD
) AMENDED
) COMPLAINT
) FOR DAMAGES
) AND
) APPROPRIATE
) EQUITABLE
) RELIEF FOR
) VIOLATION OF
) CIVIL RIGHTS
) AND RELATED
) PENDENT
) CLAIMS

Plaintiff, by his attorneys, hereby submits his Third Amended Complaint as follows:

COUNT I

42 U.S.C. § 1983 – Violation of Constitutional Rights – Roger Oliver in His Official Capacity and City of Macomb

1. Plaintiff, Kevin Albright, is now a citizen and resident of St. Louis, Missouri but was during most of the proceedings hereinafter set forth a citizen and resident of the City of Macomb, County of McDonough, State of Illinois.

2. The defendant Roger Oliver is now and at all material times herein was a citizen and resident of the County of McDonough, State of Illinois and was duly appointed, employed and acting as an officer and agent of the City if Macomb, Illinois Police Department as a detective and in doing the things hereinafter alleged that he did, the defendant Roger Oliver was acting under the color, authority, and pretext of the statutes, ordinances, regulations, customs, and usages of the City of Macomb and State of Illinois and under the color and authority of his office.

3. The defendant City of Macomb is an Illinois municipal corporation organized under and pursuant to the laws of the State of Illinois and pursuant thereto has established a police department which department is broken into various divisions including a division consisting of detectives employed for the purpose of enforcing inter alia Illinois laws pertaining to the use, possession, sale, and other dispensation of controlled substances as defined by Illinois law to which division, the City of Macomb has by ordinance, custom, policy, and regulation conferred and delegated complete authority, limited only by financial ability, as to the means which those in the detective division such as the defendant Roger Oliver herein, will employ to enforce Illinois law relating to the use, possession, sale, and other dispensation of controlled substances.

4. This action arises under federal law, particularly the Civil Rights Act of 1871, 42 U.S.C. § 1983 as hereinbelow more fully appears.

5. This court has jurisdiction of this cause under and by virtue of Title 28 U.S.C. §§ 1331 and 1343, this being an action authorized by law to redress the deprivation under color of state law of rights, privileges and immunities secured to the plaintiff by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

6. Each of the acts hereinafter alleged to have been done was done by the defendant Roger Oliver under color of the laws of the State of Illinois and under the color of the office of Roger Oliver as above described.

7. For the past 19 years, the defendant Roger Oliver has been employed as a detective by the City of Macomb, Illinois Police Department charged inter alia with responsibility for enforcing Illinois law proscribing the use, possession, sale, and other dispensation of controlled substances.

8. In that capacity, the defendant Roger Oliver is and was empowered by the City of Macomb to determine the means by which the aforementioned laws proscribing the use, sale and other dispensation of controlled substances were and are to be enforced and as such has been entrusted by the City of Macomb in particular the city council and mayor thereof, with discretionary monies to use for the purposes of purchasing controlled substances from individuals suspected of violating the law in order to arrest those individuals and/or otherwise use those individuals for further investigation into criminal activity as defined by Illinois law relative to the use, possession, sale, and other dispensation of controlled substances.

9. In the context of being so empowered by the City of Macomb, Illinois and by means of the funds given him by the mayor of the City of Macomb with approval of the city council, the defendant Roger Oliver has final decision making power and authority to determine the means by which the laws of the State of Illinois prohibiting the use, possession, sale and other dispensation of controlled substances are to be enforced by the City of Macomb, and, armed with that authority, the defendant Roger Oliver has undertaken to conduct investigations into suspected unlawful activity respecting the use, possession, sale, and other dispensation of controlled substances within the City of Macomb, State of Illinois by means of utilizing the services of so called paid informants.

10. In or about the beginning of March, 1987, and pursuant to tne policy of utilizing the services of paid informants for the purposes of ferreting out illegal controlled substance activity within the City of Macomb, the defendant Roger Oliver and the other police detectives received a request from one Veda Moore for "protection", from a former associate of hers who, with her was engaged in the use, possession, sale and other dispensation of controlled substances, and which former associate was said by Veda Moore to be threatening reprisals against said Veda Moore for Veda Moore's having failed to properly account for payment for the use, possession, sale and other dispensation of controlled substances, which "protection" Oliver agreed to give in exchange for services to be provided by Veda Moore as hereafter described.

11. Either at the time in early March, 1987, when she made the aforementioned request for "protection" or

shortly thereafter, Roger Oliver learned or should have learned that Veda Moore had just been released from a narcotics treatment facility where she had spent 30 days in treatment occasioned by her addiction to cocaine whereby it was beyond her physical and emotional power to control her craving for cocaine and other controlled substances and, accordingly, at or about the time she contacted him, the defendant Roger Oliver knew or should have known that Veda Moore remained addicted to cocaine whereby it was reckless and inherently unreasonable and unfair to place her in a position where she was being asked to make purchases of cocaine from supposed purveyors of cocaine and other controlled substances, in that, placed in that position suffering a cocaine addiction, Veda Moore became both a danger to herself and a menace to innocent persons, including plaintiff herein.

12. Notwithstanding his knowledge or what should have been his knowledge in the aforementioned respects, the defendant Roger Oliver and the other police detectives recklessly engaged the services of Veda Moore to serve as a confidential informant for him and the other police detectives in the employ of the City of Macomb for purposes of purporting to buy controlled substances from individuals said Veda Moore would identify to defendant Roger Oliver and other detectives as engaged in illegal controlled substance activity, pursuant to which arrangement, Veda Moore would be paid $50 to $75 for actual purchases of substances she would represent to the defendant Roger Oliver and other police detectives as being controlled substances, by reason of which Veda

Moore had an incentive to and did represent to the detectives such as the defendant Roger Oliver that she could make and had made purchases of putative controlled substances when in fact she had not and in so doing falsely implicated in criminal activity over 50 individuals including plaintiff herein, all resulting in aborted and dismissed prosecutions.

13. On or about July 17, 1987, at 1:25 p.m., under the circumstances as aforesaid, the aforementioned Veda Moore reported to the defendant Roger Oliver that she had made a purchase of cocaine from one John Albright, Jr. at Room 212 of the Pace Hotel in Macomb, Illinois.

14. Thereafter on or about September 2, 1987, after submitting to the Illinois State Police Crime Lab the substance Veda Moore represented was cocaine she had purchased from John Albright, Jr., on July 17, 1987, at the Pace Hotel in Macomb, Illinois, the defendant Roger Oliver learned that the substance was in fact baking powder.

15. Thereafter, on September 10, 1987, and recklessly not disclosing that he knew or should have known Veda Moore was addicted to cocaine and had lied to him respecting purchases she said she had made in order to be paid $50 or $75 per purchase, the defendant Roger Oliver testified before a McDonough County grand jury solely on the basis of what he represented Veda Moore had told him that John Albright, Jr., had sold Veda Moore a substance on July 17, 1987, at 1:25 p.m. from Room 212 of the Pace Hotel that he represented to her was cocaine and was therefore guilty of selling a so called "look alike" substance contrary to *Illinois Revised Statutes*, Ch. 56 ½

§ 1404(b), a felony, pursuant to which testimony the grand jury on September 10, 1987, returned an indictment against John Albright, Jr., and a warrant for his arrest was thereupon issued by the Circuit Court in and for McDonough County, Illinois.

16. After the Circuit Court in and for McDonough County, Illinois issued a warrant for the arrest of John Albright, Jr., based upon the testimony of Roger Oliver as aforesaid before the McDonough County grand jury which testimony in turn had been predicated upon the representations made by the aforementioned Veda Moore, Roger Oliver attempted to execute said warrant at the home of John Albright, Jr. at 2 Twig Road, Macomb, Illinois on or about September 28, 1987, only to learn that John Albright, Jr. was a man over 60 years of age who was a registered pharmacist and in all likelihood had never been in the Pace Hotel, a student and transient establishment, let alone in Room 212 at the Pace Hotel on July 17, 1987, at 1:25 p.m. and it was suggested to defendant Roger Oliver that perhaps the individual for whom Roger Oliver was looking was one John David Albright, one of the sons of John Albright, Jr.

17. Thereafter, on or about September 28, 1987, the defendant Roger Oliver without conducting any further investigation and without further attempting to determine or learn the circumstances of what it was Veda Moore had done on or about July 17, 1987, when she represented she had purchased cocaine from John Albright, Jr., at Room 212 of the Pace Hotel, recklessly scratched out the name "John Albright, Jr." on the warrant for the arrest of John Albright, Jr. and recklessly put

in its place the name "John David Albright" and undertook again to perfect service of the warrant this time on John David Albright, who on September 28, 1987, was in Chicago working where he had been for the preceding year.

18. Upon learning that a warrant for his arrest was in the process of being served upon him for purposes of effecting his arrest, the aforementioned John David Albright traveled to Macomb from Chicago where on or about October 1, 1987, he went to the Macomb Police Department and made his presence known to the defendant Roger Oliver for purposes of determining what the circumstances were pursuant to which defendant Roger Oliver desired to effect the arrest of said John David Albright and, upon learning those circumstances, the aforementioned John David Albright advised defendant Roger Oliver that any charge against him of selling any substance from Room 212 of the Pace Hotel in Macomb, Illinois on July 17, 1987, was an impossibility inasmuch as on that date and at that time he, John David Albright, had been working in Chicago where he had been living for the previous one year, pursuant to which advice the defendant Roger Oliver suggested that the individual for whom the defendant was perhaps looking was Kevin Albright, John David Albright's brother to which suggestion John David Albright was unknowing.

19. Thereafter and in the presence of John David Albright on October 1, 1987, defendant Roger Oliver placed a long distance telephone call to Veda Moore who by October 1, 1987, was in Florida, during which cail he advised her that the individual from whom she allegedly purchased cocaine on July 17, 1987, at the Pace Hotel in

Macomb, Illinois could not have been John Albright, Jr. or John David Albright and inquired whether or not it might have been Kevin Albright, pursuant to which inquiry, the defendant Roger Oliver, and without any further independent investigation or verification, recklessly accepted Veda Moore's statement during the aforementioned long distance telephone conversation that it was Kevin Albright from whom she had purchased cocaine at Room 212 of the Pace Hotel on July 17, 1987.

20. Thereafter, defendant Roger Oliver, on October 16, 1987, recklessly attested to a criminal information against plaintiff Kevin Albright charging plaintiff Kevin Albright with "on or about the 17th day of July, 1987 . . . knowingly and unlawfully distribut(ing) a look alike substance to Veda Moore . . . ", for which criminal information Roger Oliver then and there well knew or should have known that no probable cause existed as said criminal information was based upon the inherently unreliable statements and representations of the aforementioned Veda Moore whom Roger Oliver knew or should have known was addicted to cocaine and was providing information to the police, as plaintiff is informed, believes, and thereon alleges, solely for the purpose of securing funds for the purchase of controlled substances for her own use and benefit.

21. Thereafter, pursuant to the criminal information to which he had attested and caused to be filed against the plaintiff Kevin Albright, defendant Roger Oliver at first recklessly changed the arrest warrant which had theretofore been prepared first naming John Albright, Jr. and then John David Albright to now put the name Kevin

Albright without, however, making any attempt to further learn or understand the circumstances of the purported purchase and sale of cocaine on July 17, 1987, from Room 212 of the Pace Hotel, nor any further attempt to learn and ascertain what basis, if any, existed for the arrest of anyone for such alleged purchase and sale of cocaine as had been reported to him by the aforementioned Veda Moore, and, thereafter and specifically pursuant to the new information to which he had recklessly, wrongfully and without probable cause attested on October 16, 1987, defendant Roger Oliver on October 19, 1987, recklessly caused the issuance of a new arrest warrant for the arrest of Kevin Albright.

22. Upon learning that a criminal information had been sworn out by defendant Roger Oliver against him and that a warrant for his arrest had been issued, plaintiff Kevin Albright on or about October 19, 1987, turned himself in to defendant Roger Oliver and advised Roger Oliver that he had never sold cocaine or any substance to anyone at any time, let alone to Veda Moore on or about July 17, 1987, notwithstanding which information, the defendant Roger Oliver, without probable cause, caused plaintiff Kevin Albright to be arrested pursuant to the facially invalid warrant above described under a bail of $3,500 pursuant to which Kevin Albright was able to post the requisite 10% bond or $350, but was thereafter pursuant to the terms and conditions of said bond limited in his freedom of movement and association and in particular, was not permitted to travel outside the State of Illinois without court approval and was otherwise obliged to retain counsel at great expense and to appear in the Illinois Circuit Court for the Ninth Judicial Circuit at all

times required of him notwithstanding the fact that Kevin Albright as defendant Roger Oliver then and there fully well knew or should have known had never engaged in any criminal activity and had in particular never sold any controlled substance or any substance of any kind or description whatsoever to Veda Moore on July 17, 1987, or any other date.

23. Thereafter, during the pendency of the prosecution against him in state court, plaintiff, being then a senior at Western Illinois University and having been in the process of inquiring into job opportunities in the St. Louis, Missouri area, inquired of his lawyer in the underlying state court proceeding whether he could secure the state court's permission for him to travel to the State of Missouri for purposes of interviewing for said jobs, and his lawyer advised him that in order to secure the approval of the state court would require the expenditure of additional monies for attorney's fees, would require the attendance at a hearing, and would further risk the possibility that the state court might not give its approval to the interstate travel as requested by the plaintiff, in response to which, the plaintiff let the matter drop and did not travel to Missouri or anywhere else during the pendency of the state criminal action against him thereby causing delay in plaintiff securing employment.

24. Thereafter, on or about January 5, 1988, the criminal matter against the plaintiff herein which had been instituted by and because of the defendant Roger Oliver's recklessly accepting the inherently unreliable and contradictory information provided him by the aforementioned Veda Moore whom Roger Oliver knew or should have known was addicted to cocaine and who

otherwise had an incentive to provide information, valid or otherwise, and who by January 5, 1988, as Roger Oliver knew or should have known, was institutionalized in an intensive care narcotics addiction hospital in Kansas City, Missouri came on before the Illinois Circuit Court for preliminary hearing at which time the defendant Roger Oliver recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified and which information to which he testified was at odds with the testimony he had on September 10, 1987, given the McDonough County, Illinois grand jury respecting the same transaction, the Illinois Circuit Court found probable cause and bound the matter over for further proceedings.

25. Thereafter, on June 27, 1988, the Illinois Circuit Court entered an order dismissing the information against plaintiff herein for the reason that the information which had been filed did not state an offense under Illinois law.

26. The circumstances concerning the arrest, charging, and prosecution of plaintiff herein received widespread newspaper and radio coverage all of which associated plaintiff Kevin Albright's name with drug and narcotics dealing all of which was false and all to his damage.

27. By reason of defendant Roger Oliver's having relied solely upon the representations of someone addicted to controlled substances and who had a motive for giving false and incorrect information to the police in order that she could secure money for the purchase of additional controlled substances, and without having

instituted any independent means of verification of purported controlled substance purchases, such as the use of marked bills, use of eavesdropping devices, personal surveillance at all critical times, and by accepting without any independent means or verification or independent determinations of probable cause, three different identifications of the one person from whom she allegedly purchased what she falsely represented was cocaine, the defendant Roger Oliver acted recklessly and acted under circumstances where no reasonable police officer could have mistakenly believed he had probable cause to effect the charging, arrest, and prosecution of plaintiff Kevin Albright under the circumstances herein described.

28. By reason of Roger Oliver in implementing the policy of the City of Macomb as above described in paragraphs 9-26 hereof by paying Veda Moore funds with which she was able to illegally purchase controlled substances for her own use in consideration of purporting to purchase controlled substances from others under circumstances where the necessary effect, as defendants knew or should have known, was to subject innocent people such as plaintiff herein to arrest and prosecution, the defendant Roger Oliver and the City of Macomb recklessly subjected innocent people such as plaintiff Kevin Albright to prosecution under Illinois law prohibiting the illegal use, sale, and possession of controlled substances while at the same time not only not subjecting paid informants such as Veda Moore to the rigors and penalties of the Illinois criminal law relative to the use, sale, and possession of controlled substances, said defendants in fact facilitated, aided, and abetted those paid

informants such as Veda Moore in participating in conduct in violation of Illinois law prohibiting the use, sale and possession of controlled substances and thereby subjected plaintiff to the unequal protection of the law.

29. As a result of the defendants' action as hereinabove described, plaintiff was obliged to and did expend large sums of money in employing attorneys and agents in order to secure his vindication from the effects of defendants' unconstitutional actions and enforcement of unconstitutional policies as abovedescribed.

30. By reason of the foregoing, the defendant Roger Oliver and the City of Macomb in implementing the policies and procedures hereinabove described, have abridged plaintiff's rights, privileges and immunities secured him under the Constitution and laws of the United States as follows:

a. The substantive right, secured by the Equal Protection Clause, not to be deprived equal protection of the laws by a reckless and arbitrary public criminal prosecution where no criminal offense had been committed and perfected for the purpose or having the necessary effect of securing preferential treatment under the law for one party at the expense of another.

b. The substantive right, secured by the Fourteenth Amendment Due Process Clause, not to be deprived liberty in all its aspects including, but not limited to, rights secured by the Fourth Amendment, right to occupational liberty, rights to travel and association, and right to reputation free from taint and obloquy by a

false, reckless, arbitrary, defamatory and discriminatory public prosecution where no criminal offense had been committed.

c. The substantive right, protected by the Fourteenth Amendment Due Process Clause, not to be deprived property by arbitrary and reckless affirmative conduct under color of state law in the form of a public criminal prosecution where no crime had been committed.

31. As a direct and proximate result of defendant Roger Oliver's unlawful, unreasonable, and unconstitutional conduct in the particulars above described subjecting plaintiff to the deprivation of his rights, privileges, and immunities secured by the Constitution of the United States as above described, plaintiff was and is greatly injured in sums according to proof as follows:

a. He has been deprived his physical liberty and all things associated with physical liberty from October 18, 1987, to through and including June 27, 1988, in that by the terms of his bond, his liberty, freedom of associations and freedom of movement were circumscribed, limited, and impaired.

b. He has been obliged to, did pay, and became liable to pay large sums of money in defending himself and in securing the judicial declaration of his innocence of the charges caused to be brought against him by the defendants and to secure his freedom from the unlawful restraints placed upon his person and being by the actions of the defendants.

c. His good reputation has been brought into public disgrace and scandal among his neighbors and other worthy citizens of the

McDonough County, Illinois community, some of whom, not knowing his innocence, have believed and suspected and still believe and suspect that plaintiff was guilty of selling cocaine and related offenses.

d. He has been and is greatly hindered and prevented from transacting his affairs and business and has been unable to secure employment for himself in the Macomb, McDonough County area and moved to St. Louis for the purposes of securing employment.

e. He has been deprived his ability to secure credit.

f. He has had his good name irreparably damaged by extensive radio and newspaper coverage of the defendants' wrongful actions and all the proceedings incident thereto.

g. He has lost business and credit opportunities.

h. He has lost business and contractual relationships.

i. He has been deprived earnings and earnings capacity.

j. He has been otherwise devastated and ruined by the wrongful and malicious and oppressive actions perpetrated by the defendants in prosecuting plaintiff under circumstances where not only was plaintiff innocent of any criminal offense, the defendants unreasonably relied upon information that they knew or should have known was unreliable and false and in so doing greatly damaged the plaintiff.

32. Plaintiff is informed, believes, and thereon alleges that the defendant Roger Oliver acting in his official capacity as above described as a police detective with the City of Macomb, Illinois persists in his belief that his method of police detection of utilizing the services of paid informants under the circumstances hereinabove described wherein he unreasonably and unjustifiably relied upon the inherently contradictory and unreliable information of Veda Moore which she had a motive to give in order to subject plaintiff and others similarly situated to the damages suffered by plaintiff is an acceptable method of law enforcement by reason of which the defendant Roger Oliver in effectuating the policies of the City of Macomb relative to the enforcement of Illinois law pertaining to the use, possession, sale and other dispensation of controlled substances will, unless preliminarily and permanently restrained and enjoined by this court, continue to subject citizens of Macomb, Illinois to arrest and prosecution under circumstances where no probable cause exists and no reasonable police officer could think probable cause exists to subject such citizens to arrest and prosecution, all in violation of their rights under the Fourth and Fourteenth Amendments to the United States Constitution.

33. By reason of the immediately foregoing, plaintiff and others similarly situated have no adequate remedy at law and must seek thereby to invoke this court's powers of equity and pursuant thereto seek to preliminarily and permanently enjoin the utilization by defendant Roger Oliver in effectuating the policies of the City of Macomb of unreasonable means of police detection characterized by using paid informants whose information is inherently

unreliable and relying upon those informants where no reasonable police officer could or should so rely.

WHEREFORE, plaintiff prays for judgment against the defendants as follows:

a. Preliminary and permanent injunctive relief against the defendants Roger Oliver in his official capacity and the City of Macomb from hereafter utilizing the services of paid informants whom they either knew or should know are incapable of giving reliable information and from relying on such informants under circumstances where the effect is necessarily to deprive innocent citizens such as plaintiff herein the right to be secure in their persons and their right to equal protection of the laws.

b. Special damages in a sum according to proof.

c. General damages in the sum of $500,000.

d. Court costs, expert witness fees, if any, interest at the statutory rate.

e. Reasonable attorney's fees under 42 U.S.C. § 1988.

f. Such other and further relief as to the court seems just and appropriate under the circumstances.

COUNT II

Violation 42 U.S.C. § 1983 –
Roger Oliver in His Individual Capacity

1. Plaintiff Kevin Albright is now a citizen and resident of St. Louis, Missouri but was during most of the

proceedings hereinafter set forth a citizen and resident of the City of Macomb, County of McDonough, State of Illinois.

2. The defendant Roger Oliver in his individual capacity is now and was at all material times herein a citizen and resident of the County of McDonough, State of Illinois and was duly appointed, employed and acting as an officer and agent of the City of Macomb, Illinois Police Department as a detective and in doing the things hereinafter alleged that he did, the defendant Roger Oliver was acting individually and under the color of authority and pretext of the statutes, ordinances, regulations, customs and usages of the City of Macomb and State of Illinois.

3. This action arises under federal law, particularly the Civil Rights Act of 1871, 42 U.S.C. § 1983 as hereinbelow more fully appears.

4. This court has jurisdiction of this cause under and by virtue of Title 28 U.S.C. §§ 1331 and 1343, this being an action authorized by law to redress the deprivation under color of state law of rights, privileges and immunities secured plaintiff by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

5. Each of the acts hereinafter alleged to have been was done was done by the defendant Roger Oliver individually but under color of the laws of the State of Illinois and under the color of the office of Roger Oliver as above described.

6. The past 19 years, defendant Roger Oliver has been employed as a detective by the City of Macomb, Illinois Police Department charge [sic] with inter alia the responsibility for enforcing Illinois law proscribing the use, possession, sale and other dispensation of controlled substances.

7. In that capacity, the defendant Roger Oliver is and has been empowered by the City of Macomb to determine the means by which the aforementioned laws proscribed in the use, possession, sale and other dispensation of controlled substances were and are to be enforced and as such has been entrusted by the City of Macomb with funds to use for the purpose of purchasing controlled substances from individuals suspected of violating the law for the purposes of arresting those individuals and/or otherwise using those individuals for further investigation into criminal activity as defined by Illinois law relative to the use, possession, sale and other dispensation of controlled substances.

8. In the context of the discretion conferred upon him by the City of Macomb, Illinois and by means of discretionary monies given him by the City of Macomb, Illinois, the defendant Roger Oliver has undertaken to conduct investigations and into suspected the unlawful activity respecting the use, possession, sale and other dispensation of controlled substances within the City of Macomb, State of Illinois by means of utilizing the services of so called paid informants.

9. In or about the beginning of March, 1987, and pursuant to his practice and procedure under color of law of utilizing these services of paid informants for the

purposes of ferreting out illegal controlled substance activity within the City of Macomb, the defendant Roger Oliver received a request from one Veda Moore for "protection" from a former associate of hers who, with her, was engaged in the use, possession, sale and other dispensation of controlled substances and which former associate was said by Veda Moore to be threatening reprisals against said Veda Moore for Veda Moore's having failed to properly account for profits for the use, possession, sale and other dispensation of controlled substances, which "protection" Oliver agreed to give in exchange for services to be provided by Veda Moore as hereafter described.

10. Either at that time in March, 1987, or shortly thereafter Roger Oliver learned or should have learned that Veda Moore at the time she made the aforementioned request for "protection" was addicted to cocaine whereby it was beyond her physical and emotional power to control her craving for cocaine and other controlled substances.

11. Notwithstanding his knowledge or what should have been his knowledge in the aforementioned respects, the defendant Roger Oliver and the other police detectives recklessly engaged the services of Veda Moore to serve as a confidential informant for him and the other police detectives in the employ of the City of Macomb for purposes of purporting to buy controlled substances from individuals said Veda Moore would identify to defendant Roger Oliver and other detectives an engaged in illegal controlled substance activity, pursuant to which arrangement, Veda Moore would be paid $50 to $75 for actual purchases of substances she would represent to the

defendant Roger Oliver and other police detectives as being controlled substances, by reason of which Veda Moore had an incentive to and did represent to the detectives such as the defendant Roger Oliver that she could make and had made purchases of putative controlled substances when in fact she had not and in so doing falsely implicated in criminal activity over 50 individuals including plaintiff herein, all resulting in aborted and dismissed prosecutions.

12. On or about July 17, 1987, at 1:25 p.m. under the circumstances aforesaid, the aforementioned Veda Moore reported to the defendant Roger Oliver that she had made a purchase of cocaine from John Albright, Jr., at Room 212 at the Pace Hotel in Macomb, Illinois.

13. Thereafter on or about September 2, 1987, after submitting to the Illinois State Police Crime Lab the substance Veda Moore represented was cocaine she had purchased from John Albright, Jr., on July 17, 1987, at the Pace Hotel in Macomb, Illinois, the defendant Roger Oliver learned that the substance was in fact baking powder.

14. Thereafter, on September 10, 1987, and recklessly not disclosing that he knew or should have known Veda Moore was addicted to cocaine and had lied to him respecting purchases she said she had made in order to be paid $50 or $75 per purchase, the defendant Roger Oliver testified before a McDonough County grand jury solely on the basis of what he represented Veda Moore had told him that John Albright, Jr., had sold Veda Moore a substance on July 17, 1987, at 1:25 p.m. from Room 212 of the Pace Hotel that he represented to her was cocaine

and was therefore guilty of selling a so called "look alike" substance contrary to *Illinois Revised Statutes*, Ch. 56 ½ § 1404(b), a felony, pursuant to which testimony the grand jury on September 10, 1987, returned an indictment against John Albright, Jr., and a warrant for his arrest was thereupon issued by the Circuit Court in and for McDonough County, Illinois.

15. After the Circuit Court in and for McDonough County, Illinois issued a warrant for the arrest of John Albright, Jr., based upon the testimony of Roger Oliver as aforesaid before the McDonough County grand jury which testimony in turn had been predicated upon the representations made by the aforementioned Veda Moore, Roger Oliver attempted to execute said warrant at the home of John Albright, Jr. at 2 Twig Road, Macomb, Illinois on or about September 28, 1987, only to learn that John Albright, Jr. was a man over 60 years of age who was a registered pharmacist and in all likelihood had never been in the Pace Hotel, a student and transient establishment, let alone in Room 212 at the Pace Hotel on July 17, 1987, at 1:25 p.m. and it was suggested to defendant Roger Oliver that perhaps the individual for whom Roger Oliver was looking was one John David Albright, one of the sons of John Albright, Jr.

16. Thereafter, on or about September 28, 1987, the defendant Roger Oliver without conducting any further investigation and without further attempting to determine or learn the circumstances of what it was Veda Moore had done on or about July 17, 1987, when she represented she had purchased cocaine from John Albright, Jr., at Room 212 of the Pace Hotel, recklessly

scratched out the name "John Albright, Jr." on the warrant for the arrest of John Albright, Jr. and recklessly put in its place the name "John David Albright" and undertook again to perfect service of the warrant this time on John David Albright, who on September 28, 1987, was in Chicago working where he had been for the preceding year.

17. Upon learning that a warrant for his arrest was in the process of being served upon him for purposes of effecting his arrest, the aforementioned John David Albright traveled to Macomb from Chicago where on or about October 1, 1987, he went to the Macomb Police Department and made his presence known to the defendant Roger Oliver for purposes of determining what the circumstances were pursuant to which defendant Roger Oliver desired to effect the arrest of said John David Albright and, upon learning those circumstances, the aforementioned John David Albright advised defendant Roger Oliver that any charge against him of selling any substance from Room 212 of the Pace Hotel in Macomb, Illinois on July 17, 1987, was an impossibility inasmuch as on that date and at that time he, John David Albright, had been working in Chicago where he had been living for the previous one year, pursuant to which advice the defendant Roger Oliver suggested that the individual for whom the defendant was perhaps looking was Kevin Albright, John David Albright's brother to which suggestion John David Albright was unknowing.

18. Thereafter and in the presence of John David Albright on October 1, 1987, defendant Roger Oliver placed a long distance telephone call to Veda Moore who by October 1, 1987, was in Florida, during which call he

advised her that the individual from whom she allegedly purchased cocaine on July 17, 1987, at the Pace Hotel in Macomb, Illinois could not have been John Albright, Jr. or John David Albright and inquired whether or not it might have been Kevin Albright, pursuant to which inquiry, the defendant Roger Oliver, and without any further independent investigation or verification, recklessly accepted Veda Moore's statement during the aforementioned long distance telephone conversation that it was Kevin Albright from whom she had purchased cocaine at Room 212 of the Pace Hotel on July 17, 1987.

19. Thereafter, defendant Roger Oliver, on October 16, 1987, recklessly attested to a criminal information against plaintiff Kevin Albright charging plaintiff Kevin Albright with "on or about the 17th day of July, 1987 . . . knowingly and unlawfully distribut(ing) a look alike substance to Veda Moore . . . ", for which criminal information Roger Oliver then and there well knew or should have known that no probable cause existed as said criminal information was based upon the inherently unreliable statements and representations of the aforementioned Veda Moore whom Roger Oliver knew or should have know was addicted to cocaine and was providing information to the police, as plaintiff is informed, believes, and thereon alleges, solely for the purpose of securing funds for the purchase of controlled substances for her own use and benefit.

20. Thereafter, pursuant to the criminal information to which he had attested and caused to be filed against the plaintiff Kevin Albright, defendant Roger Oliver at first recklessly changed the arrest warrant which had theretofore been prepared first naming John Albright, Jr.

and then John David Albright to now put the name Kevin Albright without, however, making any attempt to further learn or understand the circumstances of the purported purchase and sale of cocaine on July 17, 1987, from Room 212 of the Pace Hotel, nor any further attempt to learn and ascertain what basis, if any, existed for the arrest of anyone for such alleged purchase and sale of cocaine as had been reported to him by the aforementioned Veda Moore, and, thereafter and specifically pursuant to the new information to which he had recklessly, wrongfully and without probable cause attested on October 16, 1987, defendant Roger Oliver on October 19, 1987, recklessly caused the issuance of a new arrest warrant for the arrest of Kevin Albright.

21. Upon learning that a criminal information had been sworn out by defendant Roger Oliver against him and that a warrant for his arrest had been issued, plaintiff Kevin Albright on or about October 19, 1987, turned himself in to defendant Roger Oliver and advised Roger Oliver that he had never sold cocaine or any substance to anyone at any time, let alone to Veda Moore on or about July 17, 1987, notwithstanding which information, the defendant Roger Oliver, without probable cause, caused plaintiff Kevin Albright to be arrested pursuant to the facially invalid warrant above described under a bail of $3,500 pursuant to which Kevin Albright was able to post the requisite 10% bond or $350, but was thereafter pursuant to the terms and conditions of said bond limited in his freedom of movement and association and in particular, was not permitted to travel outside the State of Illinois without court approval and was otherwise obliged to retain counsel at great expense and to appear in the

Illinois Circuit Court for the Ninth Judicial Circuit at all times required of him notwithstanding the fact that Kevin Albright as defendant Roger Oliver then and there fully well knew or should have known had never engaged in any criminal activity and had in particular never sold any controlled substance or any substance of any kind or description whatsoever to Veda Moore on July 17, 1987, or any other date.

22. Thereafter, during the pendency of the prosecution against him in state court, plaintiff, being then a senior at Western Illinois University and having been in the process of inquiring into job opportunities in the St. Louis, Missouri area, inquired of his lawyer in the underlying state court proceeding whether he could secure the state court's permission for him to travel to the State of Missouri for purposes of interviewing for said jobs, and his lawyer advised him that in order to secure the approval of the state court would require the expenditure of additional monies for attorney's fees, would require the attendance at a hearing, and would further risk the possibility that the state court might not give its approval to the interstate travel as requested by the plaintiff, in response to which, the plaintiff let the matter drop and did not travel to Missouri or anywhere else during the pendency of the state criminal action against him thereby causing delay in plaintiff securing employment.

23. Thereafter, on or about January 5, 1988, the criminal matter against the plaintiff herein which had been instituted by and because of the defendant Roger Oliver's recklessly accepting the inherently unreliable and contradictory information provided him by the aforementioned Veda Moore whom Roger Oliver knew or

should have known was addicted to cocaine and who otherwise had an incentive to provide information, valid or otherwise, and who by January 5, 1988, as Roger Oliver knew or should have known, was institutionalized in an intensive care narcotics addiction hospital in Kansas City, Missouri came on before the Illinois Circuit Court for preliminary hearing at which time the defendant Roger Oliver recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified and which information to which he testified was at odds with the testimony he had on September 10, 1987, given the McDonough County, Illinois grand jury respecting the same transaction, the Illinois Circuit Court found probable cause and bound the matter over for further proceedings.

24. Thereafter, on June 27, 1988, the Illinois Circuit Court entered an order dismissing the information against plaintiff herein for the reason that the information which had been filed did not state an offense under Illinois law.

25. The circumstances concerning the arrest, charging, and prosecution of plaintiff herein received widespread newspaper and radio coverage all of which associated plaintiff Kevin Albright's name with drug and narcotics dealing all of which was false and all to his damage.

26. By reason of defendant Roger Oliver's having relied solely upon the representations of someone addicted to controlled substance and who had a motive for giving false and incorrect information to the police in order that she could secure money for the purchase of

additional controlled substances, and without having instituted any independent means of verification of purported controlled substance purchases, such as the use of marked bills, use of eavesdropping devices, personal surveillance at all critical times, and by accepting without any independent means or verification or independent determinations of probable cause, three different identifications of the one person from whom she allegedly purchased what she falsely represented was cocaine, the defendant Roger Oliver acted recklessly and acted under circumstances where no reasonable police officer could have mistakenly believed he had probable cause to effect the arrest, charging and prosecution of plaintiff Kevin Albright under the circumstances herein described.

27. By reason of Roger Oliver paying Veda Moore funds with which she was able to illegally purchase controlled substances for her own use in consideration of purporting to purchase controlled substances from others under circumstances where the necessary effect, as defendant knew or should have known, was to subject innocent people such as plaintiff herein to arrest and prosecution, the defendant Roger Oliver and the City of Macomb recklessly subjected innocent people such as plaintiff Kevin Albright to prosecution under Illinois law prohibiting the illegal use, sale, and possession of controlled substances while at the same time not only not subjecting paid informants such as Veda Moore to the rigors and penalties of the Illinois criminal law relative to the use, sale, and possession of controlled substances, said defendant in fact facilitated, aided, and abetted those paid informants such as Veda Moore in participating in conduct in violation of Illinois law prohibiting the use,

sale and possession of controlled substances and thereby subjected plaintiff to the unequal protection of the law.

28. As a result of the defendant's action as hereinabove described, plaintiff was obliged to and did expend large sums of money in employing attorneys and agents in order to secure his vindication from the effects of defendant's unconstitutional actions and enforcement of unconstitutional policies as abovedescribed.

29. By reason of the foregoing, the defendant Roger Oliver in taking the actions hereinabove described, has abridged plaintiff's rights, privileges and immunities secured him under the Constitution and laws of the United States as follows:

a. The substantive right, secured by the Equal Protection Clause, not to be deprived equal protection of the laws by a reckless and arbitrary public criminal prosecution where no criminal offense had been committed and perfected for the purpose or having the necessary effect of securing preferential treatment under the law for one party at the expense of another.

b. The substantive right, secured by the Fourteenth Amendment Due Process Clause, not to be deprived liberty in all its aspects including, but not limited to, rights secured by the Fourth Amendment, right to occupational liberty, rights to travel and association, and right to reputation free from taint and obloquy by a false, reckless, arbitrary, defamatory and discriminatory public prosecution where no criminal offense had been committed.

c. The substantive right, protected by the Fourteenth Amendment Due Process Clause, not

to be deprived property by arbitrary and reckless affirmative conduct under color of state law in the form of a public criminal prosecution where no crime had been committed.

30. As a direct and proximate result of defendant Roger Oliver's unlawful, unreasonable, and unconstitutional conduct in the particulars above described subjecting plaintiff to the deprivation of his rights, privileges, and immunities secured by the Constitution of the United States as above described, plaintiff was and is greatly injured in sums according to proof as follows:

a. He has been deprived his physical liberty and all things associated with physical liberty from October 18, 1987, to through and including June 27, 1988, in that by the terms of his bond, his liberty, freedom of associations and freedom of movement were circumscribed, limited, and impaired.

b. He has been obliged to, did pay, and became liable to pay large sums of money in defending himself and in securing the judicial declaration of his innocence of the charges caused to be brought against him by the defendant and to secure his freedom from the unlawful restraints placed upon his person and being by the actions of the defendant.

c. His good reputation has been brought into public disgrace and scandal among his neighbors and other worthy citizens of the McDonough County, Illinois community, some of whom, not knowing his innocence, have believed and suspected and still believe and suspect that plaintiff was guilty of selling cocaine and related offenses.

d. He has been and is greatly hindered and prevented from transacting his affairs and business and has been unable to secure employment for himself in the Macomb, McDonough County area and moved to St. Louis for the purposes of securing employment.

e. He has been deprived his ability to secure credit.

f. He has had his good name irreparably damaged by extensive radio and newspaper coverage of the defendant's wrongful actions and all the proceedings incident thereto.

g. He has lost business and credit opportunities.

h. He has lost business and contractual relationships.

i. He has been deprived earnings and earnings capacity.

j. He has been otherwise devastated and ruined by the wrongful and malicious and oppressive actions perpetrated by the defendant in prosecuting plaintiff under circumstances where not only was plaintiff innocent of any criminal offense, the defendant unreasonably relied upon information that they knew or should have known was unreliable and false and in so doing greatly damaged the plaintiff.

31. Plaintiff is informed, believes, and thereon alleges that the defendant Roger Oliver acting in his official capacity as above described as a police detective with the City of Macomb, Illinois persists in his belief

that his method of police detection of utilizing the services of paid informants under the circumstances hereinabove described wherein he unreasonably and unjustifiably relied upon the inherently contradictory and unreliable information of Veda Moore which she had a motive to give in order to subject plaintiff and others similarly situated to the damages suffered by plaintiff is an acceptable method of law enforcement by reason of which the defendant Roger Oliver in effectuating the policies of the City of Macomb relative to the enforcement of Illinois law pertaining to the use, possession, sale and other dispensation of controlled substances will, unless preliminarily and permanently restrained and enjoined by this court, continue to subject citizens of Macomb, Illinois to arrest and prosecution under circumstances where no probable cause exists and no reasonable police officer could think probable cause exists to subject such citizens to arrest and prosecution, all in violation of their rights under the Fourth and Fourteenth Amendments to the United States Constitution.

32. By reason of the immediately foregoing, plaintiff and others similarly situated have no adequate remedy at law and must seek thereby to invoke this court's powers of equity and pursuant thereto seek to preliminarily and permanently enjoin the utilization by defendant Roger Oliver in effectuating the policies of the City of Macomb of unreasonable means of police detection characterized by using paid informants whose information is inherently unreliable and relying upon those informants where no reasonable police officer could or should so rely.

33. The actions of the defendant Roger Oliver were willful, wanton, malicious and reckless and conducted

with a willful, wanton and reckless disregard of the plaintiff's rights, feelings, and sensitivities and his rights under the United States Constitution.

WHEREFORE, plaintiff prays for judgment against the defendant Roger Oliver as follows:

a. Preliminary and permanent injunctive relief against the defendant Roger Oliver from hereafter utilizing the services of paid informants whom they either know or should know are incapable of giving reliable information and from relying on such informants under circumstances where the effect is necessarily to deprive innocent citizens such as plaintiff herein the right to be secure in their persons and their right to equal protection of the laws.

b. Special damages in a sum according to proof.

c. General damages in the sum of $500,000.

d. Punitive damages in the sum of $500,000 against the defendant Roger Oliver.

e. Court costs, expert witness fees, if any, interest at the statutory rate.

f. Reasonable attorney's fees under 42 U.S.C. § 1988.

g. Such other and further relief as to the court seems just and appropriate under the circumstances.

COUNT III

Malicious Prosecution – Common Law – Roger Oliver

1. This action arises under the principles of ancillary and pendent jurisdiction.

2. Plaintiff Kevin Albright is now a citizen and resident of St. Louis, Missouri but for all times relative herein was a citizen and resident of Macomb, Illinois.

3. Plaintiff is now and always has been a good and honest citizen and, as such, has never been guilty of any major criminal offenses and, until the time of the commission of the several occurrences by defendant as hereinafter mentioned, had never been suspected to have been guilty of controlled substance related offenses or the use, possession or sale or other dispensation of controlled substances and by reason of the foregoing, plaintiff, before the acts of the defendant as hereafter described, deservedly enjoyed and held the good opinion and credit of all his neighbors and associates.

4. The defendant Roger Oliver in his individual capacity is now and was at all material times herein a citizen and resident of the County of McDonough, State of Illinois and was duly appointed, employed and acting as an officer and agent of the City of Macomb, Illinois Police Department as a detective.

5. In that capacity, the defendant Roger Oliver is and has been empowered by the City of Macomb to determine the means by which the aforementioned laws proscribed in the use, possession, sale and other dispensation of controlled substances were and are to be

enforced and as such has been entrusted by the City of Macomb with discretionary monies to use for the purpose of purchasing controlled substances from individuals suspected of violating the law for the purposes of arresting those individuals and/or otherwise using those individuals for further investigation into criminal activity as defined by Illinois law relative to the use, possession, sale and other dispensation of controlled substances.

6. In the context of the discretion conferred upon him by the City of Macomb, Illinois and by means of discretionary monies given him by the City of Macomb, Illinois, the defendant Roger Oliver has undertaken to conduct investigations and into suspected the unlawful activity respecting the use, possession, sale and other dispensation of controlled substances within the City of Macomb, State of Illinois by means of utilizing the services of so called paid informants.

7. In or about the beginning of March, 1987, and pursuant to his practice and procedure under color of law of utilizing the services of paid informants for the purposes of ferreting out illegal controlled substance activity within the City of Macomb, the defendant Roger Oliver received a request from one Veda Moore for "protection" from a former associate of hers who, with her, was engaged in the use, possession, sale and other dispensation of controlled substances and which former associate was said by Veda Moore to be threatening reprisals against said Veda Moore for Veda Moore's having failed to properly account for profits for the use, possession, sale and other dispensation of controlled substances.

8. Either at that time in March, 1987, or shortly thereafter Roger Oliver learned or should have learned that Veda Moore at the time she made the aforementioned request for "protection" was addicated to cocaine whereby it was beyond her physical and emotional power to control her craving for cocaine and other controlled substances.

9. Notwithstanding his knowledge or what should have been his knowledge in the aforementioned respects, the defendant Roger Oliver undertook to and did engage the services of Veda Moore to serve as a confidential informant for him and other police detectives in the employ of the City of Macomb for the purposes of purporting to buy controlled substances from individuals said Veda Moore would identify to defendant Roger Oliver and other detectives as engaged in illegal controlled substance activity pursuant to which arrangement Veda Moore would be paid on a piecework basis for actual purchases of substances she would represent to the defendant Roger Oliver and other police detectives as being controlled substances, by reason of which Veda Moore had an incentive to represent to the detectives including the defendant Roger Oliver that she could make and had made purchases of putative controlled substances.

10. On or about July 17, 1987, at 1:25 p.m. under the circumstances aforesaid, the aforementioned Veda Moore reported to the defendant Roger Oliver that she had made a purchase of cocaine from John Albright, Jr., at Room 212 at the Pace Hotel in Macomb, Illinois.

11. Thereafter on or about September 2, 1987, after submitting to the Illinois State Police Crime Lab the substance Veda Moore represented was cocaine she had purchased from John Albright, Jr., on July 17, 1987, at the Pace Hotel in Macomb, Illinois, the defendant Roger Oliver learned that the substance was in fact baking powder.

12. Thereafter, on September 10, 1987, and not disclosing that he knew or should have known Veda Moore was addicted to cocaine and had lied to him respecting purchases she said she had made in order to be paid $50 or $75 per purchase, the defendant Roger Oliver testified before a McDonough County grand jury solely on the basis of what he represented Veda Moore had told him that John Albright, Jr., had sold Veda Moore a substance on July 17, 1987, at 1:25 p.m. from Room 212 of the Pace Hotel that he represented to her was cocaine and was therefore guilty of selling a so called "look alike" substance contrary to *Illinois Revised Statutes*, Ch. 56½ § 1404(b), a felony, pursuant to which testimony the grand jury on September 10, 1987, returned an indictment against John Albright, Jr., and a warrant for his arrest was thereupon issued by the Circuit Court in and for McDonough County, Illinois.

13. After the Circuit Court in and for McDonough County, Illinois issued a warrant for the arrest of John Albright, Jr., based upon the testimony of Roger Oliver as aforesaid before the McDonough County grand jury which testimony in turn had been predicated upon the representations made by the aforementioned Veda Moore, Roger Oliver attempted to execute said warrant at the home of John Albright, Jr. at 2 Twig Road, Macomb,

Illinois on or about September 28, 1987, only to learn that John Albright, Jr. was a man over 60 years of age who was a registered pharmacist and in all likelihood had never been in the Pace Hotel let alone in Room 212 at the Pace Hotel on July 17, 1987, at 1:25 p.m. and it was suggested to defendant Roger Oliver that perhaps the individual for whom Roger Oliver was looking was one John David Albright, one of the sons of John Albright, Jr.

14. Thereafter, on or about September 28, 1987, the defendant Roger Oliver without conducting any further investigation and without further attempting to determine or learn the circumstances of what it was Veda Moore had done on or about July 17, 1987, when she represented she had purchased cocaine from John Albright, Jr., at Room 212 of the Pace Hotel, scratched out the name "John Albright, Jr." on the warrant for the arrest of John Albright, Jr. and put in its place the name "John David Albright" and undertook again to perfect service of the warrant this time on John David Albright, who on September 28, 1987, was in Chicago working where he had been for the preceding year.

15. Upon learning that a warrant for his arrest was in the process of being served upon him for purposes of effecting his arrest, the aforementioned John David Albright traveled to Macomb from Chicago where on or about October 1, 1987, he went to the Macomb Police Department and made his presence known to the defendant Roger Oliver for purposes of determining what the circumstances were pursuant to which defendant Roger Oliver desired to effect the arrest of said John David Albright and, upon learning those circumstances, the aforementioned John David Albright advised defendant

Roger Oliver that any charge against him of selling any substance from Room 212 of the Pace Hotel in Macomb, Illinois on July 17, 1987, was an impossibility inasmuch as on that date and at that time he, John David Albright, had been working in Chicago where he had been living for the previous one year, pursuant to which advice the defendant Roger Oliver suggested that the individual for whom the defendant was perhaps looking was Kevin Albright, John David Albright's brother to which suggestion John Davis Albright was unknowing.

16. Thereafter and in the presence of John David Albright on September 28, 1987, defendant Roger Oliver placed a long distance telephone call to Veda Moore who by September 28, 1987, was in Florida, during which call he advised her that the individual from whom she allegedly purchased cocaine on July 17, 1987, at the Pace Hotel in Macomb, Illinois could not have been John Albright, Jr. or John David Albright and inquired whether or not it might have been Kevin Albright, pursuant to which inquiry, the defendant Roger Oliver, and without any further independent investigation or verification, accepted Veda Moore's statement during the aforementioned long distance telephone conversation that it was Kevin Albright from whom she had purchased cocaine at Room 212 of the Pace Hotel on July 17, 1987.

17. Thereafter, defendant Roger Oliver, on October 16, 1987, attested to a criminal information against plaintiff Kevin Albright charging plaintiff Kevin Albright with "on or about the 17th day of July, 1987 . . . knowingly and unlawfully distribut(ing) a look alike substance to Veda Moore . . . ", for which criminal information Roger Oliver then and there will well knew or should have known that

no probable cause existed as said criminal information was based upon the inherently unreliable statements and representations of the aforementioned Veda Moore whom Roger Oliver knew or should have known was addicted to cocaine and was providing information to the police, as plaintiff is informed, believes, and thereon alleges, solely for the purpose of securing funds for the purchase of controlled substances for her own use and benefit.

18. Thereafter, pursuant to the criminal information to which he had attested and caused to be filed against the plaintiff Kevin Albright, defendant Roger Oliver at first changed the arrest warrant which had theretofore been prepared first naming John Albright, Jr. and then John David Albright to now put the name Kevin Albright without, however, making any attempt to further learn or understand the circumstances of the purported purchase and sale of cocaine on July 17, 1987, from Room 212 of the Pace Hotel, nor any further attempt to learn and ascertain what basis, if any, existed for the arrest of anyone for such alleged purchase and sale of cocaine as had been reported to him by the aforementioned Veda Moore, and, thereafter and specifically pursuant to the new information to which he had wrongfully and without probable cause attested on October 16, 1987, defendant Roger Oliver on October 19, 1987, caused the issuance of a new arrest warrant for the arrest of Kevin Albright.

19. Upon learning that a criminal information had been sworn out by defendant Roger Oliver against him and that a warrant for his arrest had been issued, plaintiff Kevin Albright on or about October 19, 1987, turned himself in to defendant Roger Oliver and advised Roger Oliver that he had never sold cocaine or any substance to

anyone at any time, let alone to Veda Moore on or about July 17, 1987, notwithstanding which information, the defendant Roger Oliver, without probable cause, caused plaintiff Kevin Albright to be arrested pursuant to the facially invalid warrant above described under a bail of $3,500 pursuant to which Kevin Albright was able to post the requisite 10% bond or $350, but was thereafter pursuant to the terms and conditions of said bond limited in his freedom of movement and association and in particular, was not permitted to travel outside the State of Illinois without court approval and was otherwise obliged to appear in the Illinois Circuit Court for the Ninth Judicial circuit at all times required of him notwithstanding the fact that Kevin Albright as defendant Roger Oliver then and there fully well knew or should have known had never engaged in any criminal activity and had in particular never sold any controlled substance or any substance of any kind or description whatsoever to Veda Moore on July 17, 1987, or any other date.

20. Thereafter, during the pendency of the prosecution against him in state court, plaintiff, being a senior at Western Illinois University at the time the charges against him were preferred, and having been in the process of inquiring into job opportunities in the St. Louis, Missouri area, inquired of his lawyer in the underlying state court proceeding whether or not he could secure the state court's permission for him to travel to the State of Missouri for purposes of interviewing for said jobs, and his lawyer advised him that in order to secure the approval of the state court would require the expenditure of additional monies for attorney's fees, would require the attendance at a hearing, and would further risk the possibility

that the state court might not give its approval to the interstate travel as requested by the plaintiff, in response to which, the plaintiff let the matter drop and did not travel to Missouri or anywhere else during the pendency of the state criminal action against him thereby causing delay in plaintiff securing employment.

21. Thereafter, on or about January 5, 1988, the criminal matter against the plaintiff herein which had been instituted by and because of the defendant Roger Oliver's accepting the inherently unreliable and contradictory information provided him by the aforementioned Veda Moore whom Roger Oliver knew or should have known was addicted to cocaine and who otherwise had an incentive to provide information, valid or otherwise, and who by January 5, 1988, as Roger Oliver knew or should have known was institutionalized in an intensive care narcotics addiction hospital in Kansas City, Missouri came on before the Illinois Circuit Court for preliminary hearing at which time the defendant Roger Oliver failed to advise the court of the inherently unreliable nature of the information to which he testified and which information to which he testified was at odds with the testimony he had on September 10, 1987, given the McDonough County, Illinois grand jury respecting the same transaction, the Illinois Circuit Court found probable cause and bound the matter over for further proceedings.

22. Thereafter, on June 27, 1988, the Illinois Circuit Court entered an order dismissing the information against plaintiff herein for the reason that the information which had been filed did not state an offense under Illinois law.

23. The circumstances concerning the arrest, charging, and prosecution of plaintiff herein received widespread newspaper and radio coverage all of which associated plaintiff Kevin Albright's name with drug and narcotics dealing all of which was false and all to his damage.

24. By reason of defendant Roger Oliver's having relied solely upon the representations of someone addicted to controlled substances and who had a motive for giving false and incorrect information to the police in order that she could secure money for the purchase of additional controlled substances, and without having instituted any independent means of verification of purported controlled substance purchases, such as the use of marked bills, use of eavesdropping devices, personal surveillance at all critical times, and by accepting without any independent means or verification or independent determinations of probable cause, three different identifications of the one person from whom she allegedly purchased what she represented was cocaine, the defendant Roger Oliver acted unreasonably and acted under circumstances where no reasonable police officer could have mistakenly believed he had probable cause to effect the arrest, charging and prosecution of plaintiff Kevin Albright under the circumstances herein described.

25. By reason of Roger Oliver in implementing the policy of the City of Macomb as above described by paying Veda Moore funds with which she was able to illegally purchase controlled substances for her own use in consideration of purporting to purchase controlled substance for the purposes of subjecting innocent people such as plaintiff herein to arrest and prosecution, the

defendant Roger Oliver and the City of Macomb have subjected people such as plaintiff Kevin Albright to the unequal protection of the laws, by reason of all of which, defendant Roger Oliver's actions were reckless and malicious.

26. As a direct and proximate result of the defendant Roger Oliver's reckless, malicious actions in effecting the arrest and charging of plaintiff herein under circumstances where he had no probable cause to believe plaintiff had committed any criminal offense under the laws of the State of Illinois, the plaintiff herein has been greatly injured in sums according to proof as follows:

a. He has been deprived his physical liberty and all things associated with physical liberty from October 18, 1987, to through and including June 27, 1988, in that by the terms of his bond, his liberty, freedom of associations and freedom of movement were circumscribed, limited, and impaired.

b. He has been obliged to, did pay, and became liable to pay large sums of money in defending himself and in securing the judicial declaration of his innocence of the charges caused to be brought against him by the defendant and to secure his freedom from the unlawful restraints placed upon his person and being by the actions of the defendant.

c. His good reputation has been brought into public disgrace and scandal among his neighbors and other worthy citizens of the McDonough County, Illinois community, some of whom, not knowing his innocence, have believed and suspected and still believe and

suspect that plaintiff was guilty of selling cocaine and related offenses.

d. He has been and is greatly hindered and prevented from transacting his affairs and business and has been unable to secure employment for himself in the Macomb, McDonough County area and moved to St. Louis for the purposes of securing employment.

e. He has been deprived his ability to secure credit.

f. He has had his good name irreparably damaged by extensive radio and newspaper coverage of the defendant's wrongful actions and all the proceedings incident thereto.

g. He has lost business and credit opportunities.

h. He has lost business and contractual relationships.

i. He has been deprived earnings and earnings capacity.

j. He has been otherwise devastated and ruined by the wrongful and malicious and oppressive actions perpetrated by the defendant in prosecuting plaintiff under circumstances where not only was plaintiff innocent of any criminal offense, the defendant unreasonably relied upon information that they knew or should have known was unreliable and false and in so doing greatly damaged the plaintiff.

27. Plaintiff is informed, believes, and thereon alleges that the defendant Roger Oliver acting in his official capacity as above described as a police detective with the City of Macomb, Illinois persists in his belief

that his method of police detection of utilizing the services of paid informants under the circumstances hereinabove described wherein he unreasonably and unjustifiably relied upon the inherently contradictory and unreliable information of Veda Moore which she had a motive to give in order to subject plaintiff and others similarly situated to the damages suffered by plaintiff is an acceptable method of law enforcement by reason of which the defendant Roger Oliver in effectuating the policies of the City of Macomb relative to the enforcement of Illinois law pertaining to the use, possession, sale and other dispensation of controlled substances will, unless preliminarily and permanently restrained and enjoined by this court, continue to subject citizens of Macomb, Illinois to arrest and prosecution under circumstances where no probable cause exists and no reasonable police officer could think probable cause exists to subject such citizens to arrest and prosecution, all in violation of their rights under the Fourth and Fourteenth Amendments to the United States Constitution.

28. By reason of the immediately foregoing, plaintiff and others similarly situated have no adequate remedy at law and must seek thereby to invoke this court's powers of equity and pursuant thereto seek to preliminarily and permanently enjoin the utilization by defendant Roger Oliver in effectuating the policies of the City of Macomb of unreasonable means of police detection characterized by using paid informants whose information is inherently unreliable and relying upon those informants where no reasonable police officer could or should so rely.

29. The actions of the defendant Roger Oliver were willful, wanton, malicious and reckless and conducted

with a willful, wanton and reckless disregard of the plaintiff's rights, feelings, and sensitivities and his rights under the United States Constitution.

WHEREFORE, plaintiff prays for judgment against the defendant Roger Oliver as follows:

a. Preliminary and permanent injunctive relief against the defendant Roger Oliver from hereafter utilizing the services of paid informants whom they either know or should know are incapable of giving reliable information and from relying on such informants under circumstances where the effect is necessarily to deprive innocent citizens such as plaintiff herein the right to be secure in their persons and their right to equal protection of the laws.

b. Special damages in a sum according to proof.

c. General damages in the sum of $500,000.

d. Punitive damages in the sum of $500,000 against the defendant Roger Oliver.

e. Court costs, expert witness fees, if any, interest at the statutory rate.

f. Reasonable attorney's fees under 42 U.S.C. § 1988.

g. Such other and further relief as to the court seems just and appropriate under the circumstances.

Respectfully Submitted:

LAW OFFICES OF JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

/s/ John H. Bisbee
JOHN H. BISBEE

DATED: November 25, 1991

CERTIFICATE OF MAILING AND FACSIMILE TRANSMISSION

I hereby certify that I have on this 25th day November, 1991, deposited a true and correct copy of the foregoing SUBSTITUTED THIRD AMENDED COMPLAINT FOR DAMAGES AND APPROPRIATE EQUITABLE RELIEF FOR VIOLATION OF CIVIL RIGHTS AND RELATED PENDENT CLAIMS in the United States mails, postage prepaid and by facsimile transmission to Mr. James Sotos, Schirott & Associates, P.C., 105 E. Irving Park Road, P.O. Box 247, Itasca, Illinois 60143.

/s/ John H. Bisbee

PLAINTIFF DEMANDS TRIAL BY A JURY OF SIX (6)

APPENDIX H

8-101. Limitation of actions

§ 8-101. No civil action may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued. For purposes of this Article, the term "civil action" includes any action, whether based upon the common law or statutes or Constitution of this State.

Supreme Court, U.S.
FILED
FEB 4 1993
OFFICE OF THE CLERK

No. 92-833

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEVIN ALBRIGHT,

Petitioner,

v.

ROGER OLIVER, individually and in his official capacity as police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation, and the CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RELEVANT STATUTES

Ill.Rev.Stat. ch. 38, para. 110-10(a)(3) (1991):

(a) If a Person is released prior to conviction, either upon payment of bail security or on his or her own recognizance, the conditions of the bail bond shall be that he or she will:

(3) Not depart this State without leave of the court;

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE INITIATION OF CRIMINAL CHARGES WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN THE PRESENCE OF PROBABLE CAUSE DOES NOT GIVE RISE TO A FEDERAL DUE PROCESS CLAIM PURSUANT TO 42 U.S.C. § 1983

The issue, as framed by Petitioner, is whether the initiation of criminal charges without an objectively reasonable belief in the presence of probable cause deprives a criminal defendant of a liberty interest without due process (Petitioner's Petition for a Writ of *Certiorari* (hereinafter Petition), Questions Presented). Petitioner does not contend that the circumstances of his prosecution violated the fourth amendment, but rather, Petitioner merely analogizes to the fourth amendment's requirement of probable cause to support his effort to engraft a probable cause requirement onto the due process clause of the fourteenth amendment (Petition, pp. 18-19).

A. The Constitution Does Not Contain a Requirement of Probable Cause to Prosecute

Respondents contend that the presence or absence of probable cause is irrelevant to the constitutional validity of the decision to bring criminal charges. Indeed, the due process clause does not, on its face, refer to probable cause. To the contrary, the phrase "probable cause" is confined to the fourth amendment, and addresses the legality of searches and seizures of a person or her possessions. *See, e.g., Winston v. Lee*, 470 U.S. 753, 759 (1985). Accordingly, this Honorable Court has acknowledged that "the probable cause determination is not a constitutional prerequisite to the charging decision." *Gerstein v. Pugh*, 420

U.S. 103, 125 n. 26 (1975). It would seem, therefore, that the lack of textual support for a requirement of probable cause to prosecute, in conjunction with this Court's statement in *Gerstein*, should close the door on Petitioner's efforts to federalize the common law tort of malicious prosecution. *Cf. Wilson v. Seiter*, 111 S.Ct. 2321, 2326 (1991) ("an intent requirement is either implicit in the word punishment or is not, it cannot be alternately required under the eighth amendment and ignored as policy considerations might dictate").

Nevertheless, certain courts have inferred a requirement of probable cause to prosecute from the due process clause in an effort to avoid what they have perceived to be a draconian alternative.[1] This trend began with *Wheeler v. Cosden Oil and Chemical Co.*, where the Fifth Circuit concluded, essentially on the basis of public policy, that a prosecutor carries a constitutionally imposed "duty to determine probable cause before charging." 734 F.2d 254, 259-60 (5th Cir. 1984). *But see Brummett v. Camble*, 946 F.2d 1178, 1180-81 n. 2 (5th Cir. 1991) (questioning continued vitality of *Wheeler*), *cert. denied*, 112 S.Ct. 2323 (1992). Conceding that its holding was tenuous in light of *Gerstein*, the *Wheeler* court nonetheless concluded that without a probable cause requirement, "the state prosecutor need have no basis whatever for criminal charges—even trivial ones—but may without constitutional disapproval subject whomever he wishes to whimsical prosecution." *Wheeler*, 734 F.2d at 259.

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[1] *See, e.g., Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988); *Strength v. Hubert*, 854 F.2d 421, 525-26 (11th Cir. 1988); *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989), *cert. denied*, *Maxwell v. Goodwin*, 494 U.S. 1081 (1990).

This public policy concern expressed by *Wheeler* and its progeny is unsound. In the context of criminal prosecutions, the sixth amendment provides the bulwark of constitutional protections to criminal defendants. Indeed, the sixth amendment guarantees of right to counsel and a fair jury trial provide the most specific and important constitutional protections against arbitrary and whimsical prosecutions. *See* U.S. Const. Amend. VI. *Accord Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990) ("Constitution mandates procedures designed to protect defendants").

Moreover, several other constitutional guarantees have been interpreted to provide protections against unfounded prosecutions. For instance, the equal protection clause prohibits discriminatory or selective prosecutions. *Wayte v. United States*, 470 U.S. 598, 608 (1985). The fifth amendment prohibits a criminal defendant from being tried twice and entitles him to remain silent at trial. U.S. Const. Amend. V. The first amendment guarantees that citizens will not be subjected to criminal prosecutions in retaliation for protected speech. *Wilson v. Thompson*, 638 F.2d 799 (6th Cir. 1981). The fourth amendment operates to cause the suppression of illegally obtained evidence and confessions at trial. *Mapp v. Ohio*, 367 U.S. 643 (1961). In addition, as pointed out by Petitioner (Petition, p. 15), the due process clause has been interpreted to require proof of guilt beyond a reasonable doubt in order to sustain a criminal conviction. *In re: Winship*, 397 U.S. 358 (1970).

When considered together, this wide array of constitutional protections soundly defeats the *Wheeler* court's concern that a requirement of probable cause is necessary to guard against unfounded prosecutions. While a probable cause requirement would perhaps provide an added layer of constitutional protection, it certainly would not stand alone as the only buffer between a citizen and his ex-

posure to unfounded criminal charges. In the search and seizure context, by contrast, the substantive requirement of probable cause in conjunction with the procedural protections provided by the warrant requirement serve as essentially the sole constitutional checks on the government's otherwise unfettered power to arbitrarily invade privacy interests. *See, e.g., Soldal v. Cook County, Ill.*, 113 S.Ct. 538 (1992). Accordingly, even if considerations of public policy were the proper method for analyzing the source and scope of constitutional protections, such considerations would not compel a probable cause requirement in connection with the bringing of criminal charges.

B. The Constitution Does Not Require the Initiation of Criminal Charges to be Supported by an Objectively Reasonable Belief in the Presence of Probable Cause

Having dispensed with the suggestion that every prosecution without probable cause raises constitutional concerns, Respondents now turn to the heart of Petitioner's contention: that probable cause is a constitutional prerequisite to the filing of criminal charges when an officer's mistaken belief in its presence is "objectively unreasonable." (Petition, pp. 20-21) To support that theory, Petitioner relies essentially on official immunity cases such as *Malley v. Briggs*, 475 U.S. 335 (1986), and *Anderson v. Creighton*, 483 U.S. 635 (1987), which impose liability for false arrest under § 1983 only for an objectively unreasonable failure to recognize the absence of probable cause. Petitioner also relies on *United States v. Leon*, 468 U.S. 897 (1984) which permits application of the exclusionary rule in criminal cases only where an illegal seizure of evidence was objectively reasonable.

Petitioner's novel and rather creative argument misguidedly collapses the fourth amendment into the due

process clause and confuses immunity considerations with constitutional analysis. Probable cause is either a requirement of due process or it is not; the absence of probable cause is not any more or less unconstitutional because the officer reasonably or unreasonably perceived it to be present. While objective reasonableness as described in cases such as *Malley* and *Anderson* would be instructive in assessing Respondents' entitlement to qualified immunity in the event probable cause were held to be a constitutional precondition to the filing of charges, that concept and those cases are irrelevant in terms of answering the threshold question as to the inter-relationship between probable cause and the due process clause.[2] Indeed, qualified immunity is simply a judicially created remedy which benefits the public by limiting the liabilities faced by public officials who mistakenly, but reasonably engage in constitutionally infirm conduct. This immunity has no genesis in the Constitution and it is irrelevant to constitutional analysis.

Similarly, *Leon* simply limits the application of another judicially created remedy (the exclusionary rule) in situations where law enforcement officials mistakenly, yet reasonably seize evidence in violation of the fourth amendment. *See Leon*, 468 U.S. at 906-07. The holding in *Leon* was not constitutionally based, but rather, was premised, like immunity decisions, on considerations of public policy involving a balancing of privacy and law enforcement interests. *Id.* Accordingly, *Leon* provides no support to Petitioner's efforts to engraft a probable cause requirement

[2] *Malley* does not, as Petitioner suggests (Petition, p. 21), speak to the "reckless pursui[t] [of] a baseless prosecution," but rather, *Malley* addressed only the scope of immunity for an officer's efforts to procure an arrest warrant.

(whether based on "objective reasonableness" or not) onto the due process clause.

Given the lack of either textual underpinnings or a policy-based necessity for a requirement of probable cause to prosecute, it seems the only remaining justification lies in the fact that the states have adopted such a requirement through the common law tort of malicious prosecution. This justification, however, is inadequate. First, it is well-established that the mere violation of state law is insufficient to give rise to a constitutional claim. *Paul v. Davis*, 424 U.S. 693, 700 (1976). Second, it is equally well-established that the federal courts are loathe to turn § 1983 into a font of federal tort law. *Id.*

C. The Conditions of Petitioner's Bond Did Not Constitute A "Significant Restraint of Liberty" Within the Meaning of *Gerstein v. Pugh*

Respondents do not contend that the filing of criminal charges can never trigger a requirement of probable cause. To the contrary, *Gerstein* teaches that probable cause is required "only for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Gerstein v. Pugh*, 420 U.S. 103, 125 n. 26 (1975). Thus, a criminal defendant's incarceration pending dismissal of criminal charges constitutes a sufficient deprivation of liberty to trigger the fourth amendment's requirement of probable cause. *Id.* at 125.

But what about a prosecution where the defendant is free on bond during the pendency of the charges? Can the conditions of bond themselves cause a deprivation of liberty sufficient to warrant federal review of the propriety of a criminal prosecution? This Honorable Court hinted at the answer in *Gerstein* in stating that probable cause

is only required when the prosecution causes a "significant restraint on liberty." *Gerstein*, 420 U.S. at 125 n. 26.[3]

Petitioner argues that the circumstances of his prosecution and the conditions of his bond do constitute a significant restraint on liberty based, in part, on cases interpreting the speedy trial clause of the sixth amendment. Specifically, Petitioner contends that the speedy trial clause protects liberty, and one aspect of liberty in the context of a criminal prosecution is the "right to be let alone" and to be spared the anxiety, anguish and disruption of life posed by the pendency of criminal charges (Petition, pp. 22-25). In support, Petitioner cites *United States v. MacDonald*, 456 U.S. 1, 8 (1982), where this Court stated that "the speedy trial guarantee is designed [among other things] to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail . . ." (Petition, p. 23).

Notwithstanding this dicta in *MacDonald*, the mere conditions of bail are an insufficient restraint on liberty to trigger a probable cause requirement. While Petitioner has focused on the minimal restraints on liberty imposed by the conditions of bond, he has not addressed the wide latitude of freedom permitted under America's bail system. Most notably, the criminal defendant is free from physical confinement. He may also work, earn a living and remain with his family and friends. He may even leave the state in appropriate cases provided he seeks leave of court before doing so. *See* Ill.Rev.Stat. ch. 38, para.

[3] Several courts of appeal agree that malicious prosecution is not, of itself, constitutionally redressable. *See, e.g., Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990); *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987); *Smith v. Massachusetts Dept. of Correction*, 936 F.2d 1390, 1402 (1st Cir. 1991).

110-10(a)(3) (1991). In short, the criminal defendant who is free on bond enjoys a relatively unimpaired existence, albeit often burdened with some harm to reputation, and with anxiety and mental hardship caused by concern over the potential disposition of the charges.

Though Respondents do not minimize Petitioner's legitimate reaction to the placement of criminal charges against him, the Constitution has never been read to provide a remedy for every inconvenience or disruption of life occasioned by the government.[4] And, while Petitioner accurately identifies the "right to be let alone" as an aspect of liberty protected under the speedy trial clause, it is the least important of the three interests protected under the sixth amendment. *See* W. LaFave & J. Israel, *Criminal Procedure*, Vol. 2, § 18.1, pp. 397-98 (1984). Far more compelling are concerns over the length of a suspect's incarceration pending disposition of criminal charges and the fact that the passage of too much time will interfere with the defendant's ability to defend against the charges. *Id.* General claims of anxiety and stress, on the other hand, are inevitable in response to criminal charges and fail to raise sixth amendment concerns absent a more specific and serious showing of actual prejudice. *Id.*, § 18.2, p. 410 (requiring unusual showing of prejudice). *See also United States v. Simmons*, 536 F.2d 827, 831-32 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976); *Stukes v. Shovlin*, 464 F.2d

[4] Petitioner also suggests that his prosecution without a reasonable belief in probable cause placed him at risk of a conviction on less than proof beyond a reasonable doubt (Petition, pp. 19-21). It is true that this evidentiary threshold has been interpreted as constitutionally required. *In re: Winship*, 397 U.S. 358 (1970). Nonetheless, in light of the fact that Petitioner was never convicted, it is implausible to contend that the mere exposure to the risk of a constitutional deprivation can itself constitute an actionable deprivation of liberty.

1211, 1214-15 (3rd Cir. 1972) (requiring showing of "severe anxiety reaction" attendant to prolonged confinement).

Other cases further illustrate the principle that mere interference with a citizen's "right to be let alone" does not of itself support a constitutional claim. For instance, witnesses may be compelled to appear before a grand jury and to provide evidence without even implicating the fourth amendment, despite the substantial anxiety and disruption occasioned by receipt of a grand jury subpoena. *See United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973). In such instances, this Court has emphasized that not every inconvenience and disruption of life attributable to the government implicates the Constitution. *Dionisio*, 410 U.S. at 10.

Similarly, in *Baker v. McCollan*, 443 U.S. 137 (1979), this Court implied that the extent of the intrusion, rather than the mere fact of interference with liberty, was relevant to the presence of a constitutional duty. In that case, a county sheriff was not constitutionally required to investigate the claims of innocence of an arrestee who was detained for a few days pursuant to a valid arrest warrant. This Court noted, however, that at a certain unspecified point in time, the length of the detention could trigger a constitutional duty to investigate a plausible explanation. *Id.* at 144-45. *See also Coleman v. Frantz*, 754 F.2d 719, 724 (7th Cir. 1985) ("duration of the detention . . . highly relevant to a constitutional examination").

Perhaps most persuasive on this point is this Honorable Court's discussion of liberty in *Paul v. Davis*, 424 U.S. 693 (1976). There, the Court held that damage to reputation (which, of course, causes substantial anxiety, emotional suffering and harm to social and employment opportunities) could not, by itself, support a due process claim

alleging a deprivation of liberty. Reasoning that a contrary holding would result in the federalizing of all state defamation torts, this Court disapproved of the idea of making "the fourteenth amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Id.* at 700.

As the court of appeals correctly observed, the reasoning of *Paul* is especially applicable here, as the claimed injuries in both cases are analogous (Appendix to Petition (hereinafter Appendix), pp. 5a-7a). While *Paul* involved harm to reputation which interfered with employment opportunities (424 U.S. at 697), Petitioner complains essentially of the same damage to reputation along with anxiety and mental anguish. Anxiety and mental anguish, however, are part and parcel of damage to reputation. Accordingly, Petitioner cannot realistically argue that his injuries constitute a much more serious infringement on liberty than those suffered by the plaintiff in *Paul*.

Moreover, as with the tort of defamation at issue in *Paul*, the common law tort of malicious prosecution has likewise achieved a uniform level of acceptance throughout the states. *See Restatement 2d Torts*, § 653. Because virtually every criminal defendant is either on bail or incarcerated pending trial, acceptance of Petitioner's argument here would result in the federalizing of every common law claim of malicious prosecution. Such a result would run contrary to *Paul's* admonition against a federal system of tort law. *See also Siegert v. Gilley*, 111 S.Ct. 1789 (1991).

While Petitioner's concern and anguish over the possible disposition of his criminal charges is certainly understandable, the Constitution provides adequate procedural safeguards for criminal defendants which helps reduce such

anxiety. Indeed, the right to counsel and to a fair jury trial generally enable the innocent to count on the system to exonerate them, which is exactly what occurred in this instance. Beyond existing constitutional safeguards, however, the Constitution should not be interpreted as supporting an independent liberty interest/due process claim in favor of an undetained criminal defendant who has been exonerated by the system. While the states have, for good reason, chosen to fashion a common law remedy in cases where a prosecution is initiated maliciously without probable cause, such a cause of action is not constitutionally compelled.

II.

ASSUMING PETITIONER HAS ADEQUATELY PLED A CONSTITUTIONAL CLAIM, SUCH CLAIM IS TIME-BARRED UNDER THE STATUTE OF LIMITATIONS

The statute of limitations for civil rights claims asserted in Illinois federal courts is two years. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986). Petitioner's federal lawsuit was filed on June 26, 1990. Because the criminal charges were not dismissed until June 27, 1988, the district court concluded that the statute of limitations would not bar Petitioner's § 1983 civil rights claim for malicious prosecution because such claims "accru[e] when the prosecution terminates in favor of the defendant" (Appendix, p. 17(a)).

Respondents contend that any constitutional claims pled by Petitioner accrued when the charges were placed against him in July, 1987, rather than when they were dismissed in late June, 1988. The accrual date for federal causes of action is determined by reference to federal law. *See 2 Moore's Federal Practice*, § 2.08(2) n. 25. A federal civil rights claim accrues when the plaintiff first has reason

to know of the injury which was caused by a constitutional deprivation. *See, e.g., Singleton v. City of New York*, 632 F.2d 185, 191 (2nd Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). In this case, the deprivation of Petitioner's liberty allegedly occurred when he was first subjected to the conditions of his bond in July, 1987. Accordingly, Petitioner's due process claim for deprivation of liberty should have accrued on July 17, 1987.

The district court's reliance on the date the charges were dismissed was premised on the fact that common law claims for malicious prosecution accrue when the prosecution terminates. This conclusion seems plausible, at first blush, based upon precedent suggesting that common law malicious prosecution becomes a federal cause of action when it is combined with the deprivation of a constitutional right. *See e.g., Rose v. Bartle*, 871 F.2d 331, 348-49 (3rd Cir. 1989); *Robinson v. Maruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990).

Respondents dispute the validity of this approach. While the circumstances surrounding the initiation of criminal charges may support a civil rights claim for deprivation of liberty, this should not lead to the federalizing of a common law tort. As Professor Sheldon Nahmod has suggested, "tort-laden terminology . . . only serves to obscure meaningful constitutional analysis." S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of § 1983*, § 3.15, p. 214 (3rd Ed. 1991). Therefore, "it is inappropriate to speak of § 1983 malicious prosecution." *Id.*

The rationale underlying Professor Nahmod's suggestion is compelling. The mere fact that a pleader can establish a federal civil rights claim arising from a state court pros-

ecution should not lead to the federalizing of a common law tort which includes other elements which are irrelevant to the deprivation of a constitutional right. For instance, the absence of probable cause is an indispensable element of a common law malicious prosecution claim, but not necessarily to the constitutionality of the decision to prosecute. *See Gerstein v. Pugh*, 420 U.S. 103, 125 n. 26 (1975). Accordingly, a civil rights plaintiff bringing a constitutional challenge to the decision to prosecute should not be required to establish the absence of probable cause unless he has been subjected to a significant restraint on liberty within the meaning of *Gerstein*. For example, neither an equal protection nor a first amendment challenge to the decision to prosecute depends on the presence or absence of probable cause.

Similarly, the common law's requirement of favorable termination of criminal charges as an element of a malicious prosecution claim is not essential to the success of a federal constitutional challenge to a particular prosecution. Indeed, even a convicted defendant may pursue a civil rights claim against those who caused his prosecution. *See King v. Goldsmith*, 897 F.2d 885 (1990); *Smith v. Springer*, 859 F.2d 31, 33-35 (7th Cir. 1988). If favorable termination is not an essential element of a civil rights challenge to an unfounded prosecution, then it makes little sense to set the accrual date for such claims on the day the prosecution is terminated.

Common law malicious prosecution claims and civil rights challenges to certain aspects of criminal prosecutions are mutually exclusive concepts which need not be interwoven or superimposed upon each other for any purpose, including the statute of limitations. If Petitioner was deprived of a liberty interest by virtue of his prosecution, that deprivation occurred when the charges were

placed against him in July, 1987, rather than when they were dismissed approximately one year later.

Because the statute of limitations provides an alternative basis on which to affirm the Seventh Circuit, Petitioner's Petition should be denied.

III.

DEFENDANT OLIVER'S ENTITLEMENT TO QUALIFIED IMMUNITY PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT

Pursuant to principles of qualified immunity, public officials may not be subjected to suit under the Civil Rights Act unless their conduct violated clearly established constitutional rights of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This Court recently refined this test for qualified immunity, emphasizing the need for a fact-specific, particularized focus to resolving immunity claims. *Anderson v. Creighton*, 483 U.S. 635 (1987).

Even if Petitioner has sufficiently pled a liberty interest/due process claim in connection with his prosecution, the uncertainty of the constitutional framework for such claims, as evidenced by the preceding discussion, prevents any such right from being deemed clearly established. Indeed, in dissenting from the denial of a writ of *certiorari* in a recent case, Justice White noted that "there has been considerable confusion in the circuit courts concerning the availability and contours of a § 1983 malicious prosecution claim." *Campbell (sic) v. Brummett*, 112 S.Ct. 2323, *citing*, *Brummett v. Camble*, 946 F.2d 1178, 1180 n. 2 (5th Cir. 1991). Moreover, the Seventh Circuit has stated that "whether or not the right to be free from prosecution without probable cause exists, it does not appear to be

clearly established." *Kompare v. Stein*, 801 F.2d 883, 891 n. 9 (7th Cir. 1986). That same court later stated that it is an open and difficult question whether a criminal defendant who is free on bond during the pendency of criminal charges may pursue a constitutionally based malicious prosecution claim on the basis of a deprivation of liberty. *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988). Accordingly, the law has not yet recognized a clearly established constitutional right to be prosecuted only upon an objectively reasonable belief in the presence of probable cause.

Because the doctrine of qualified immunity provides an alternative basis for affirming the lower court regardless of whether Petitioner's complaint stated a cognizable cause of action under § 1983, Petitioner's petition for a writ of *certiorari* should be denied.

IV.

PETITIONER'S FAILURE TO SUFFICIENTLY ALLEGE THAT HE WAS PROSECUTED PURSUANT TO A MUNICIPAL CUSTOM, PRACTICE OR POLICY PROVIDES AN ALTERNATIVE BASIS FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THE CITY OF MACOMB

In order to state a civil rights claim against either a municipality or a public official in his official capacity, a plaintiff must show that his injury was caused by a municipal custom, practice or policy. *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658 (1978); *Kentucky v. Graham*, 473 U.S. 159 (1985) (official capacity claim). Because police misconduct claims involve actions undertaken by lower level, non-policymaking public employees, allegations based upon a single incident of such misconduct are generally insufficient to give rise to a

municipal custom or policy. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). *Cf. Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (single incident may suffice where conduct undertaken by policymaker).

In this case, Petitioner's policy allegations against the City stem from the Mayor's delegation of his responsibility for enforcing the narcotics laws to Detective Oliver. Petitioner also targets the City's decision to provide Oliver with the funds to use for the purchase of controlled substances (Appendix, pp. 37a-38a, paras. 8-9).

It stretches the imagination to claim that the provision of funding was an improper policy which caused Petitioner's injuries. Petitioner's injuries were allegedly caused by Officer Oliver's failure to discover Veda Moore's unreliability as an informant, a premise which bears no relation to the City's decision to fund the undercover drug operation. The mere fact that a municipality funds a police operation does not render it liable for every flaw in the operation itself, especially where, as here, the City had no input into the development or implementation of the investigation. If Petitioner's funding theory were accepted, every police shooting would support a *Monell* claim through an allegation that the City provided funding for purchase of the weapon.

Petitioner's targeting of the Mayor's delegation of the narcotics investigation to Officer Oliver is similarly flawed. Municipalities always delegate control over police operations to the police department. Petitioner has not alleged that the City authorized Officer Oliver to employ unreliable, paid informants, but rather, Petitioner has claimed only that the City delegated to Oliver the leeway to conduct a police operation in the manner Oliver felt proper. *See* M. Schwartz & J. Kirklin, § *1983 Litigation: Claims,*

Defenses and Fees, § 3.10, p. 169 (2nd Ed. 1991) ("highly unlikely" that malicious prosecution could support claim for municipal liability).

In essence, Petitioner brought suit based upon a single act of police misconduct and tacked on conclusory allegations of a custom, practice or policy in order to hold the City of Macomb responsible. Accordingly, as the district court concluded, even if Petitioner has sufficiently stated a § 1983 cause of action against Officer Oliver, he has failed to allege sufficient facts to support his claim against the City (Appendix, p. 25a). In conjunction with Oliver's entitlement to qualified immunity, therefore, Petitioner's failure to sufficiently allege a claim against the City provides an alternative reason for denying the writ.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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Supreme Court, U.S.
FILED
FEB 17 1993
OFFICE OF THE CLERK

No. 92-833

In The

Supreme Court of the United States

October Term, 1992

KEVIN ALBRIGHT,

Petitioner,

vs.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S BRIEF IN REPLY

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REASONS FOR GRANTING THE WRIT

A.

AN OFFICER WHO INITIATES AND PURSUES CRIMINAL CHARGES WITHOUT AN OBJECTIVELY REASONABLE RELIEF IN PROBABLE CAUSE TO SUSPECT THE ACCUSED OF CRIMINAL WRONGDOING IS NOT ENTITLED TO QUALIFIED IMMUNITY.

The Respondents have subtly but significantly altered the issue posed by the Petitioner. Respondents dwell on the "initiation" of criminal charges. Petitioner framed the issue as based upon the "initiation and *pursuit*" of criminal charges. Pet., pg. i. (Emphasis supplied)

Respondents point out that "the absence of probable cause is not any more or less unconstitutional because the officer reasonably or unreasonably perceived it to be present." Respondents' Brief pg. 6. That may or may not be accurate insofar as the accused perceives the effect upon him or her. But, it is certainly inaccurate insofar as the quality of the governmental conduct is concerned and, therefore, whether the officer is entitled to qualified immunity.

This Court has stressed that §1983 provides a "remedy against . . . abuses of state power that violate federal law. . . . " *Collins v. Harker Heights,* 503 U.S. ___, 117 L.Ed.2d 261, 269 (1992). Section 1983 does not provide a "guarantee of certain levels of safety and security" for individuals, even individuals aggrieved by governmental action or inaction. *DeShaney v. Winnebago County,* 489 U.S. 189, 195 (1989). Section 1983 does not impose "federal duties that are analogous to those traditionally imposed by state tort law." *Harker, supra,* 117 Ill.Ed.2d at 275.

The line between "abuses of state power that violate federal law," *Collins v. Harker Heights, supra,* and those that do not in the context of criminal prosecutions is the line of objective reasonableness "in light of the clearly established law and the information the officers possessed." *Anderson v. Creighton,* 483 U.S. 635, 641 (1987); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Malley v. Briggs,* 475 U.S. 335 (1986); *U.S. v. Leon,* 468 U.S. 897 (1984); *Franks v. Delaware,* 438 U.S. 154 (1977). It is the line beyond which a "reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley v. Briggs, supra,* 475 U.S. at 345. It necessarily follows that it is also the line beyond which a "reasonably well-trained officer . . . would have known [that he should not have pursued the prosecution beyond the arrest, warrant, or preliminary hearing stages]." *Id.* Therefore, a reasonably well-trained officer who initiates and pursues a prosecution where he would have known that no probable cause existed to suspect the accused of criminal wrongdoing is not entitled to qualified immunity. *Id.*

It doesn't matter that a cause of action labeled "malicious prosecution" has not been definitively recognized under §1983. Resp. Br. pp. 15-16. The objectively reasonable belief in the existence of probable cause is established as the touchstone gauging whether the initiation of criminal process resulting in search or arrest is constitutionally sanctionable by application of the exclusionary rule or an action for damages under §1983. *U.S. v. Leon, supra; Malley v. Briggs, supra.* After the initiation of criminal process, it is established that "it is possible a magistrate . . . will fail to perform as a magistrate should," and will thus fail to halt the objectively unreasonable institution of criminal process at the warrant, arrest, or detention after charge stages. *Malley v. Briggs,*

supra, 475 U.S. at 345. An objectively unreasonable prosecution pursued beyond the arrest, warrant, and detention after charge stages necessarily subjects an accused to risk of conviction on proof less than beyond a reasonable doubt because it is recognized that "a properly instructed jury may . . . convict when . . . no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 317 (1979).

Similarly to an accused who suffers "anxiety and concern" protected against by due process after a "presumptively prejudicial delay," *Barker v. Wingo,* 407 U.S. 514, 530 (1972); *Doggett v. U.S.,* 505 U.S. ___, 120 L.Ed.2d 520, 533 (1992) (Thomas, J., dissenting), an accused unreasonably subjected to an objectively unreasonable prosecution suffers presumptive prejudice in the form of the potential "onus of a criminal conviction" secured in violation of due process. *Jackson v. Virginia, supra,* 443 U.S. at 316. Such an accused, therefore, suffers the "emotional stress that *can be presumed* to result in the ordinary person from uncertainties in the prospect of facing public trial . . . . " *Strunk v. U.S.,* 412 U.S. 434, 439 (1973). (Emphasis supplied). He necessarily suffers that "emotional stress" unreasonably and contrary to due process if the "uncertainties in the prospect of facing public trial," *Strunk, supra,* are aggravated by the pursuit of a baseless, objectively unreasonable prosecution.

Thus, a prosecution pursued without an objectively reasonable belief in the existence of probable cause is an "invasion . . . of the sanctity . . . of the privacies of life . . . , of [a person's] . . . right of personal security [and] personal liberty . . . . " *Boyd v. U.S.,* 116 U.S. 616, 635 (1886); *Wolf v. Colorado,* 338 U.S. 25, 28 (1949); *Mapp v. Ohio,* 367 U.S. 643, 657 (1961). Therefore, the pursuit of a prosecution without an objectively

reasonable belief in probable cause infringes clearly established freedoms protected by the Due Process Clause. An officer who pursues such a prosecution is not entitled to qualified immunity. *Harlow v. Fitzgerald, supra; Malley v. Briggs, supra.*

B.

A §1983 ACTION FOR THE INITIATION AND PURSUIT OF AN OBJECTIVELY UNREASONABLE PROSECUTION SHOULD ACCRUE WHEN THE PROSECUTION TERMINATES FAVORABLY TO THE ACCUSED.

Petitioner submits that if this Court were to adopt the rule he has suggested in his Petition, there could be no doubt that the cause of action for initiation and pursuit of an objectively unreasonable prosecution accrues when that prosecution terminates favorably to the accused. The essence of the rule Petitioner urges is that the pursuit of an objectively unreasonable prosecution unreasonably subjects the accused to the risk of conviction on proof less than beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979). In doing that, it unreasonably subjects the accused to the "anxiety and concern accompanying public accusation," *Doggett v. U.S., supra,* 120 L.Ed.2d at 533 (Thomas, J., dissenting); *Klopfer v. North Carolina,* 386 U.S. 213, 222 (1967); *U.S. v. Marion,* 404 U.S. 307, 320 (1971); *U.S. v. MacDonald,* 456 U.S. 1, 8 (1982).

In every sense of the word, the objectively unreasonable pursuit of a prosecution is a continuing violation under the rule of *Delaware State College v. Ricks,* 449 U.S. 250 (1980). So long as the prosecution pends, the actionable conduct continues, the risk and resulting "anxiety and concern" continue and do not cease until the objectively unreasonable prosecution itself ceases. *Id.* See also

United Airlines v. Evans, 431 U.S. 553, 558 (1977). The circuits are in accord with this position. *Singleton v. City of New York,* 632 F.2d 185 (2nd Cir. 1980); *Rose v. Bartle,* 871 F.2d 331, 348-49 (3rd Cir. 1989); *Robinson v. Maruffi,* 895 F.2d 649, 654-55 (10th Cir. 1990); and *Brummett v. Camble,* 946 F.2d 1178, 1183-84 (5th Cir. 1991). Judge Jones' analysis in *Brummett v. Camble, supra,* 946 F.2d at 1183-84, is persuasive.

C.

THE TERMINATION OF AN OBJECTIVELY UNREASONABLE PROSECUTION FAVORABLY TO THE ACCUSED SHOULD BE A PREREQUISITE TO A §1983 ACTION BASED ON SUCH PROSECUTION.

The proposition that a §1983 cause of action for an objectively unreasonable prosecution does not accrue until the prosecution terminates favorably to the accused raises a question contemplated by the issue posed by the Petitioner on certiorari. That question is whether the termination of the prosecution favorably to an accused is a prerequisite to a §1983 action for the initiation and pursuit of an objectively unreasonable prosecution. It is, of course, respecting the common law tort of malicious prosecution. See Restatement (2d) Torts, §653(b).

Respondents have cited *King v. Goldsmith,* 897 F.2d 885 (7th Cir. 1990), as authority for the proposition that various unconstitutional components of what was a successful criminal prosecution resulting in conviction may be the subject of a §1983 cause of action. Respondents' Brief p. 14. That seems a dubious proposition. And, *King v. Goldsmith, supra,* does not stand for it.

In *King*, the §1983 plaintiff alleged his conviction was procured by fraud. The district court dismissed on the sole basis of the common law rule that conviction precluded a subsequent suit charging false imprisonment or malicious prosecution. *King v. Goldsmith, supra,* 897 F.2d at 886. The Seventh Circuit in *King* reversed and made clear that it was not analyzing the propriety of plaintiff's §1983 action under the principles of *res judicata* or collateral estoppel. *King v. Goldsmith, supra,* 897 F.2d at 886. See also 28 U.S.C. §1738; *Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984). Rather, it reversed solely on the district court's application of the common law rule to the case.

As Judge Posner implied in *King*, ordinary principles of claim and issue preclusion would render a §1983 suit by a convicted defendant challenging an aspect of his prosecution problematic. See *Migra v. Warren City School District Board of Education, supra; Allen v. McCurry,* 449 U.S. 90 (1980). Principles of claim and issue preclusion would seem to require that before a §1983 plaintiff could bring an action for damages on grounds necessarily implicating the argument that the conviction was the result of an objectively unreasonable belief in the existence of probable cause, he should first be obliged to successfully challenge his conviction under the various post-conviction procedures permitted in most jurisdictions. See for e.g. *Ill.Rev.Stat.* Ch. 38 §122-1 et seq. Failing that, he should be obliged to pursue remedies under the federal habeas corpus statute, 28 U.S.C. §2254.

If he were successful at any one of those stages, he would then be at the point at which a cause of action for the pursuit of an objectively unreasonable prosecution would accrue. If he were unsuccessful in any post-conviction or habeas corpus challenge, a §1983 action for the initiation and pursuit of an objectively unreasonable prosecution would seem barred as his conviction would be presumed to exist on the strength of proof beyond a reasonable doubt, a quantum substantially greater than probable cause. *Brinegar v. U.S., supra,* 338 U.S. at 175; *Locke v. U.S.,* 11 U.S. (7 Cranch) 339, 348 (1813).

Public policy and the interests of federalism and comity as recognized in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), would also apply. They should preclude a §1983 action directly or impliedly challenging a prosecution resulting in conviction on the grounds of an objectively unreasonable belief in the presence of probable cause. This Court in *Preiser v. Rodriquez, supra,* held that a convicted and incarcerated defendant who challenged the fact of his incarceration as being in violation of the Constitution and sought equitable relief was first required to seek redress under federal habeas corpus, 28 U.S.C. §2254. That rule could apply as well to §1983 damage actions brought by an unincarcerated but convicted defendant (who can show the requisite custody) who challenges the prosecution resulting in his conviction as being based upon an objectively unreasonable belief in the existence of probable cause. See *Younger v. Harris,* 401 U.S. 37 (1971) and *Judice v. Vail,* 430 U.S. 327 (1977).

A §1983 action might appear to allege something other than an argument that a prosecution resulting in conviction was based on an objectively unreasonable belief in probable cause. However, a closer analysis will often reveal that an objectively unreasonable belief in the existence of probable cause is the real basis of the claim.

That is illustrated by *King v. Goldsmith, supra* and other cases alleging the withholding of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), the knowing use of perjured testimony, *Napue v. Illinois*, 360 U.S. 264 (1959), or alleging an illegal search and seizure, *Haring v. Prosise*, 462 U.S. 306 (1983). Oftentimes the essence of arguments raising those issues will be that had exculpatory evidence not been withheld or perjured testimony not been used, there would have been no objectively reasonable belief in probable cause to suspect the accused of criminal wrongdoing. A successful collateral attack against any conviction raising issues the essence of which is an objectively unreasonable belief in probable cause should be a prerequisite to a §1983 action for the pursuit of an objectively unreasonable prosecution.

This approach is not in conflict with this Court's decision in *Haring v. Prosise, supra*. That case held that collateral estoppel and full faith and credit under 28 U.S.C. §1738 did not preclude a defendant who pleaded guilty from bringing a §1983 action challenging an unconstitutional search. However, *Haring* was limited to the circumstances of a guilty plea and the circumstances where the state courts had not afforded a full and fair opportunity to litigate the Fourth Amendment claim.

CONCLUSION

For the reasons stated above and in his Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 92-833

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Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed November 12, 1992
Certiorari Granted March 1, 1993

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Judgment of District Court, Nov. 26, 1991 (This document is omitted from this Joint Appendix as it appears as Appendix F, p. 34a, in the Petition for Certiorari)

Opinion of Court of Appeals (This document is omitted from this Joint Appendix as it appears as Appendix A, pp. 1a-12a, in the Petition for Certiorari)

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Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

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QUESTION PRESENTED

Does a groundless criminal prosecution, initiated and pursued by a law enforcement officer without an objectively reasonable belief in probable cause, infringe liberty protected by substantive due process and provide a basis for an action pursuant to 42 U.S.C. §1983?

PARTIES TO THE PROCEEDINGS

The Petitioner is Kevin Albright. Respondents are Detective Roger Oliver and the City of Macomb, Illinois.

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No. 92-833

In The

Supreme Court of the United States

October Term, 1992

KEVIN ALBRIGHT,

Petitioner,

v.

ROGER OLIVER, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., 1a-12a) is reported at 975 F.2d 343. The opinion and order of the district court (Pet. App., 13a-26a) are not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (Pet. App., 27a-28a), was entered September 14, 1992. The petition for a writ of certiorari was filed on November 12, 1992.

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

A. United States Constitution, Amendment IV:

> "[N]o warrant shall issue, but upon probable cause, supported by oath or affirmation . . . . "

B. United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . "

C. United States Constitution, Amendment XIV, §1:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . . . "

D. 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

On June 26, 1990, Petitioner Kevin Albright brought this action under 42 U.S.C. §1983 against Respondents, Detective Roger Oliver of the Macomb, Illinois police department and the City of Macomb, Illinois. (J.A. 1). He alleged that by initiating and pursuing a criminal prosecution against him without probable cause or an objectively reasonable belief in probable cause, respondents deprived him of substantive rights secured by the Due Process Clause of the Fourteenth Amendment. Pet. App., 35a-68a.

The District Court dismissed Albright's §1983 action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Pet. App., 13a-26a, 34a. The Court of Appeals affirmed. Pet. App., 1a-12a, 27a-28a, 975 F.2d 343.

The complaint[1] alleged that in March, 1987, Veda Moore, who had recently been released from a rehabilitation hospital for a cocaine addiction, asked Detective Oliver for police "protection" from a drug dealer who was threatening her for cocaine debts. Pet. App., 38a. Although Detective Oliver knew or should have known of Moore's addiction and recent hospitalization, he offered Moore police protection on the condition that she serve as an informant by making purchases of controlled substances. Pet. App., 38a-39a.

Detective Oliver did not direct Moore to individuals whom he suspected or had probable cause to believe

[1] Pet. App., 35a-68a. As the district court dismissed pursuant to Rule 12(b)(6), all well pleaded allegations are accepted as true. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

were engaged in illegal activity. Pet. App., 39a-40a. Instead, he told her to make purchases from people she identified as engaged in such activity. Pet. App., 39a-40a. Detective Oliver gave Moore money with which to make the purchases and agreed to pay her $50 to $75 for each purchase of a controlled substance that she reported. Pet. App., 39a.

The complaint alleged that over the spring and summer of 1987, Moore represented to Oliver that she purchased controlled substances from over 50 separate individuals. Pet. App., 39a-40a. All the resulting prosecutions were dismissed without convictions. Pet. App., 40a.

On July 17, 1987, Moore delivered to Detective Oliver a substance that she reported she had purchased as cocaine from one John Albright, Jr. in Room 212 of the Pace Hotel, a student and transient hotel in Macomb. Pet. App., 40a-41a. Detective Oliver submitted the substance to the police laboratory for analysis. Pet. App., 40a. On September 2, 1987, the laboratory reported that the substance was baking powder. Pet. App., 40a. Nevertheless, on September 10, 1987, without any further investigation, Detective Oliver caused a grand jury to indict John Albright, Jr. for the Illinois felony of selling a "look-alike substance,"[2] and obtained a warrant for the arrest of John Albright, Jr. on the indictment. Pet. App., 40a-41a.

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[2] *Ill.Rev.Stat.* Ch. 56½ §1404(b) provides: "It is unlawful for any person knowingly to manufacture, distribute, advertise, or possess with intent to manufacture or distribute a look-alike substance."

On September 28, 1987, three months after Moore's report and 18 days after the indictment, Detective Oliver went to the home of John Albright, Jr. to arrest him. Pet. App., 41a. Albright's wife told Detective Oliver that Albright was a retired registered pharmacist over 60 years of age and not the type of person who would likely have dealt with Moore or sold her a substance represented as cocaine from a room in a student and transient hotel. Pet. App., 41a. Mrs. Albright told Detective Oliver that the Albrights had two sons, Kevin and John David Albright. Pet. App., 41a.

Detective Oliver realized he had made a mistake and assumed the person he wanted must be John David Albright. Pet. App., 41a-42a. Without further investigation, he scratched the name of John Albright, Jr. from the arrest warrant and replaced it with the name of John David Albright. Pet. App., 41a-42a.

John David Albright had been living and working in Chicago since September, 1986. Pet. App., 42a. On October 1, 1987, upon learning of the warrant for his arrest, John David Albright traveled 200 miles to Macomb from Chicago and advised Detective Oliver that on July 17, 1987, he was living in Chicago and was not in Macomb. Pet. App., 42a.

Detective Oliver telephoned Moore who, by that time, lived in Florida and told her that neither John Albright, Jr. nor John David Albright could have been the person who made the July 17 sale. Pet. App., 42a. Detective Oliver suggested to Moore that it might have been John David's brother, Kevin, from whom she made the purchase. Pet. App., 42a. Moore agreed. Pet. App.,

42a-43a. Without any further investigation, Detective Oliver scratched the name of John David Albright from the arrest warrant and replaced it with the name of Kevin Albright. Pet. App., 44a.

Detective Oliver then, on October 16, 1987, attested to a criminal information charging that on July 17, 1987, Kevin Albright had sold a "look-alike substance" to Moore, and had an arrest warrant issued for Kevin Albright, [3] Pet. App., 43a. Petitioner Kevin Albright surrendered and advised Detective Oliver that he was in Macomb on July 17, 1987, but did not sell anything to Moore. Pet. App., 44a. Detective Oliver placed Albright under arrest and required that he post bond of $3,500. Pet. App., 44a. Albright did that by paying 10% of that sum to the Illinois Circuit Court Clerk.[4] Pet. App., 44a. A

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[3] In Illinois when the prosecution of a felony is begun by the filing of an information, the court is required to "immediately issue a warrant for the arrest [of the person charged]." *Ill.Rev.Stat.* Ch. 38 §111-2(d). Thereafter, a preliminary hearing is required to determine "if from the evidence that appears there is probable cause to believe an offense has been committed . . . ". *Ill.Rev.Stat.* Ch. 38 §109-3.

[4] *Ill.Rev.Stat.* Ch. 38 §110-7(a) and (f) provide in relevant part as follows: "The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.00 . . . When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited." See *Schilb v. Kubel*, 404 U.S. 357 (1971).

standard condition of his bond prohibited him to travel outside the state of Illinois without leave.[5] Pet. App., 44a. Albright retained counsel to defend him against the felony charge. Pet. App., 45a, 48a.

On January 5, 1988, Detective Oliver testified at a preliminary hearing that Kevin Albright sold the "look-alike substance" to Moore on July 17, 1987. Pet. App., 45a-46a. Detective Oliver did not bring to the court's attention his testimony four months earlier to the grand jury that John Albright, Jr. had sold the same "look-alike substance" to Moore on July 17; that he had accused John David Albright of the same offense; that Moore had a cocaine addiction; or that he was unable to corroborate any of the information she had given him, including the nature of the substance. Pet. App., 46a. The court found probable cause to require Albright to stand trial. Pet. App., 46a. The case received widespread media coverage falsely associating Albright with drug dealing. Pet. App., 46a.

In January, 1988, Moore was again hospitalized for her cocaine addiction. Pet. App., 46a. On June 29, 1988, the court dismissed the criminal action on the ground the charge did not state an offense. Pet. App., 46a.

The district court granted respondents' motion to dismiss on the ground that the complaint did not state a

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[5] *Ill.Rev.Stat.* Ch. 38 §110-10(a)(3) provides: (a) "If a person is admitted to bail before conviction the conditions of the bail bond shall be that he will . . . (3) Not depart this State without leave."

claim under §1983. Pet. App., 18a-20a, 22a-23a. The district court reasoned that because there is no constitutional right to a *"finding"* of probable cause, there is no §1983 action for initiating a prosecution without probable cause. Pet. App., 20a. The district court found that Albright "must point to some other distinct constitutional deprivation to maintain" the §1983 action. Pet. App., 19a. The district court also held that Detective Oliver was entitled to a defense of qualified immunity, Pet. App., 24a, and that the complaint failed to allege facts sufficient to support municipal liability against the city of Macomb. Pet. App., 24a-25a.

In affirming, the court of appeals relied on *Paul v. Davis*, 424 U.S. 693 (1976), to hold that prosecution without probable cause is a constitutional tort actionable under §1983 only if accompanied with incarceration or loss of employment or some other "palpable consequences". Pet. App., 6a-7a; 975 F.2d at 345-46. In addition, citing *Hudson v. McMillian*, 112 S.Ct. 995, 1000 (1992), the court of appeals decided that

> "in the absence of incarceration or other palpable consequences, we do not think it [prosecution without probable cause] should be actionable as a constitutional wrong. . . . [J]ust as in the garden-variety public officer defamation case that does not result in exclusion from an occupation, state tort remedies should be adequate and the heavy weaponry of constitutional litigation can be left at rest."

Id., Pet. App. 8a; 975 F.2d at 346-347. The court of appeals did not reach the other issues addressed by the district court.

SUMMARY OF THE ARGUMENT

1. The constitutional violation alleged in this case is the liberty to be free from criminal prosecution except upon probable cause protected by substantive due process. This Court has long assumed that due process requires probable cause for a criminal prosecution. *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1851); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). That is true even though the Court has held that the Constitution does not require the states to enforce that requirement with either a grand jury or a preliminary hearing procedure. *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975). The probable cause standard for a prosecution plays a vital role in protecting citizens from unfounded charges of crime, which bring to bear the prosecutorial forces of organized society in the most severe exercise of power by a government over its citizens. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). It is a minimal standard that broadly accommodates the state interest in legitimate criminal prosecution. *Gerstein v. Pugh, supra*. Prosecution without probable cause, however, is the paradigm of arbitrariness in the abuse of governmental power.

2. Section 1983 provides a remedy against such an unconstitutional abuse of state power. *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1066 (1992). Because the action is based on a Constitutional violation – the freedom from prosecution except upon probable cause protected by substantive due process – it vindicates only a right of constitutional dimension and not a "garden variety" state law tort. *Collins v. Harker Heights, supra; Daniels*

v. Williams, 474 U.S. 327, 331 (1986). Because the constitutional violation involves substantive rather than procedural due process, it is complete at the time it occurs – and cannot be corrected by any subsequent procedure. *Collins v. Harker Heights, supra*. Thus the §1983 remedy is not affected by the circumstance that the state might provide a tort law remedy in the form of a malicious prosecution action. *Monroe v. Pape*, 365 U.S. 167, 172 (1961). The §1983 action is supplementary to the state remedy. *Id*.

By operation of qualified immunity, no law enforcement officer is subject to a §1983 suit unless the officer initiated or pursued a criminal prosecution not only without probable causes but also without an objectively reasonable belief in probable cause. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Malley v. Briggs*, 475 U.S. 335, 340-342 (1986). That qualified immunity defense provides ample protection to capable law enforcement officers acting reasonably while preserving an important remedy for an innocent person subjected to unfounded criminal prosecution initiated and pursued unreasonably without probable cause. *Malley v. Briggs, supra*.

ARGUMENT

I.

THE INITIATION AND PURSUIT OF A CRIMINAL PROSECUTION BY A LAW ENFORCEMENT OFFICER WITHOUT PROBABLE CAUSE CONSTITUTE ARBITRARY GOVERNMENTAL CONDUCT WHICH VIOLATES THE DUE PROCESS CLAUSE.

A.

THE PROBABLE CAUSE STANDARD IS ESTABLISHED BY THIS COURT'S PRECEDENTS AND OUR NATION'S HISTORY AND TRADITIONS AS THE SUBSTANCE OF THE DUE PROCESS PROTECTION AGAINST ARBITRARY INITIATION AND PURSUIT OF A CRIMINAL PROSECUTION.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." This Court has held that the Due Process Clause contains both substantive and procedural protections. *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The issue in this case arises under substantive due process, which is " 'intended to secure the individual from the arbitrary exercise of the powers of government.' " *Daniels v. Williams*, 474 U.S. 327, 331 (1986), quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884).[6]

[6] Other formulations of substantive due process protection include, "prevent[ing] the government from engaging in conduct that 'shocks the conscience' ", *United States v. Salerno, supra*, 481 U.S. at 746, quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), or "interfering with rights 'implicit in the concept of

Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, ___ U.S. ___, 61 L.W. 4237, 4240 (1993) (emphasis in original). "[B]y barring certain government actions regardless of the fairness of the procedures used to implement them . . . [due process] serves to prevent governmental power from being 'used for purposes of oppression.' " *Daniels v. Williams, supra*, 474 U.S. at 331; see also *Davidson v. Cannon*, 474 U.S. 344, 347-348 (1986); *Martinez v. California*, 447 U.S. 277, 282 (1980).

In *In Re Winship*, 397 U.S. 358, 364 (1970), the Court held that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt. . . . " In reaching that result, the Court reviewed the history of the reasonable doubt standard in this country, its acceptance in common law jurisdictions, the expressions in opinions of this Court assuming that it is constitutionally required, and its role in the American scheme of criminal justice. See also *Youngberg v. Romero*, 457 U.S. 307, 315 (1982); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). " 'Substantive due process' analysis must begin with a careful description of the asserted right. . . . " *Reno v. Flores, supra*, 61 L.W. at 4240. The right must be both

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ordered liberty' ", *Salerno, supra*, quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), or that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

fundamental and "an interest traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). All of the circumstances that persuaded the Court in *Winship* to hold that the Due Process Clause includes the requirement of proof beyond a reasonable doubt for a criminal *conviction* compel the conclusion that that Clause also includes the requirement of probable cause for formal initiation and pursuit of a criminal *prosecution*.

This Court has often recognized the requirement of probable cause for a criminal prosecution. As early as 1851, the Court observed that an action for malicious prosecution would lie where a "prosecution has been carried on without a probable cause." *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1851). More recently in *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), and again in *Wayte v. United States*, 470 U.S. 598, 607 (1985), the Court said:

> In our system, *so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute*, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

(Emphasis added).

In *United States v. Marion*, 404 U.S. 307, 320 (1971), the Court equated prosecution with arrest ("whether he is free on bail or not") and said that "the Government must assert probable cause to believe the arrestee has committed a crime." See also *United States v. Lovasco*, 431 U.S.

783, 791-792 (1977) (explaining why it would be unacceptable to require prosecutors to institute "immediate prosecution upon probable cause," that is, "as soon as they are entitled to do so"); *Hoffa v. United States*, 385 U.S. 293, 310 (1966) ("Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction").[7]

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[7] The Courts of Appeals have generally held or assumed that the Due Process Clause requires probable cause for a prosecution. E.g., First Circuit: *Carey v. City of Fall River*, 870 F.2d 40, 40 (1st Cir. 1989) ("Because there was no clear lack of probable cause, defendants cannot be held liable for violating plaintiff's substantive due process rights on a malicious prosecution theory"); but see, *Morales v. Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990) (Due process violation must be "egregious"); Second Circuit: *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991) ("The right not to be arrested or prosecuted without probable cause has, of course long been a clearly established constitutional right"); Third Circuit: *Rose v. Bartle*, 871 F.2d 331, 352 (3d Cir. 1989); Fourth Circuit: *Goodwin v. Metts*, 885 F.2d 157, 159, 160 n.1 (4th Cir. 1989); Fifth Circuit: *Wheeler v. Cosden Oil and Chemical Co.*, 734 F.2d 254, 258-260 (5th Cir. 1984) ("[I]t is difficult for us to conceive a notion more repugnant to settled ideas of due process than one that the state prosecutor need have no basis whatever for criminal charges – even trivial ones – but may without constitutional disapproval subject whomever he wishes to whimsical prosecution"); see also *Saunders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992); Sixth Circuit; *Coogan v. City of Wixon*, 820 F.2d 170, 174-175 (6th Cir. 1989) ("Plaintiff failed to establish the absence of probable cause," so no constitutional violation); but see, *Dunn v. Tennessee*, 697 F.2d 121, 122 (6th Cir. 1982) (only if "egregious"); Seventh Circuit: *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (Accepted concession of both parties); Tenth Circuit *Robinson v. Maruffi*, 895 F.2d 649, 657 (10th Cir. 1990) ("[D]efendants' conduct defiled the investigation, the grand jury proceedings and trial, and was so outrageous as to deny Robinson his constitutional right to a proper probable cause determination.")

The Court has held that the standard of probable cause governs the decision of a grand jury in its performance of its "ancient role . . . of determining if there is probable cause to believe a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972); accord, *United States v. Calandra*, 414 U.S. 338, 343 (1974) ("probable cause"); see also, *Stirone v. United States*, 361 U.S. 212, 218 n.2 (1960) ("upon just grounds"); *Wood v. Georgia*, 370 U.S. 375, 390 (1962) ("upon reason"); *Hurtado v. California*, 110 U.S. 375, 390 (1962) ("upon reason"); *Hurtado v. California*, 110 U.S. 516, 522 (quoting Massachusetts Chief Justice Shaw in *Jones v. Robbins*, 8

Only *Wheeler v. Cosden Oil and Chemical Co.* devoted extensive discussion to the issue. The other decisions largely accepted the proposition in the course of determining whether Section 1983 provides a remedy. In the decision below, for example, the Seventh Circuit assumed but did not discuss that a constitutional prosecution may be initiated only upon probable cause.

The Eighth Circuit has said that "malicious prosecution can form the basis of a Section 1983 action only if the defendants' conduct also infringes some provision of the Constitution or federal law," *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990) without discussing whether it violates substantive due process. The Ninth Circuit requires an intent to deprive the accused of equal protection. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988); *Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987). These decisions appear, however, to confuse the standard for a damages claim for the violation under 42 U.S.C. §1983 with the constitutional standard itself.

Gray 329, that a grand jury indictment requires "probable cause").

Similarly, the Court has long recognized that the probable cause standard governs prosecutions without the grand jury procedure. *Hurtado v. California*, 110 U.S. 516, 538 (1884). The minimal standard in all jurisdictions for the decision to bind a defendant over for a felony is " 'probable cause.' " F.W. Miller, PROSECUTION 83 (Little, Brown 1969). As the Court held in *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975): "The standard of proof required of the prosecution is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt."

In *United States v. Lovasco*, 431 U.S. 783, 791 (1977), the Court observed that "it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause." See ABA Model Rules of Professional Conduct, Rule 3.8(a) (2d ed. 1992); see also Illinois Code of Professional Responsibility, Rule 7-103(a) ("probable cause").

Thus, the Court has long assumed that the requirement of probable cause for a prosecution is as much a part of due process as the requirement of proof beyond a reasonable doubt for a conviction. That assumed requirement "dates at least from our early years as a Nation." *In Re Winship, supra*, 397 U.S. at 361. It is accepted in all the states as the standard for a prosecution, reflecting "a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-362. "Expressions in many opinions of this Court indicate that

it has long been assumed that" probable cause to initiate a criminal charge is constitutionally required. *Id.* at 362.

Moreover, the requirement of probable cause for a prosecution "plays a vital role in the American scheme of criminal procedure." *Id.* at 363. It is "indispensable to command the respect and confidence of the community in applications of the criminal law." *Id.* at 364. The long prevailing standard of probable cause is the bulwark "safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). The requirements of probable cause to prosecute and of proof beyond a reasonable doubt to convict are twin pillars that safeguard the security of the citizenry from oppressive governmental abuse of the power of the criminal law and that combine to provide "concrete substance for the presumption of innocence." *Id.* at 363. Cf. *Ingraham v. Wright*, 430 U.S. 651, 672-673, n. 41, 42 (1977).

The most severe exercise of power by a government over its citizens lies in the initiation and pursuit of a criminal prosecution:

> "The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. . . . It is then that a defendant finds himself faced with the prosecutorial forces of organized society . . . . "

Kirby v. Illinois, 406 U.S. 682, 689-690 (1972). The invocation of criminal process pits the interest of the state in "enforcing the law in the community's protection," *Brinegar v. United States, supra*, 338 U.S. at 176, against the

"interest[s] of transcending value . . . a criminal defendant [has in] his liberty." *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958). The commencement of a prosecution "may itself result in significant burdens on a defendant . . . even if he is ultimately vindicated in an adjudication." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his association, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). A criminal prosecution inherently limits the liberty of the accused: "The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, association and participation in unpopular causes." *Klopfer v. North Carolina*, 386 U.S. 213, 221-222 (1967). "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). "Anxiety and concern" inevitably accompany public accusation "from uncertainties in the prospect of facing public trial." *Strunk v. United States*, 412 U.S. 434, 439 (1973); *United States v. Ewell*, 383 U.S. 116, 120 (1966)."

A criminal prosecution brings to bear

> "the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life."

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 814 (1987). Therefore, for an official formally to invoke this severe power with a baseless accusation of crime is the paradigm of arbitrariness and oppression in the abuse of governmental power. Such action could serve no legitimate or rational governmental purpose.

In addition, prosecution without probable cause unreasonably puts an accused at risk of wrongful conviction. The requirement of proof beyond a reasonable doubt is the ultimate protection against conviction of the innocent. That protection, however, is not always adequate. *Jackson v. Virginia*, 443 U.S. 307, 317 (1979) ("A properly instructed jury may . . . convict . . . when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. . . .") Hence, the courts may encounter convictions based on constitutionally insufficient evidence. See, *Hudson v. Louisiana*, 450 U.S. 40 (1981); *Greene v. Massey*, 437 U.S. 19 (1978); *Burks v. United States*, 437 U.S. 1 (1978); see also Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan.L.Rev. 21 (1987); Rattner, *"Convicted But Innocent,"* 12 Law and Human Behavior 283 (1988); Yant, PRESUMED GUILTY (Prometheus, 1991). Therefore, probable cause to prosecute is a sentinel of the presumption of innocence in the service of the ultimate protection of the innocent.

For those fundamental reasons the freedom from prosecution except upon probable cause is a right that is "implicit in the concept of ordered liberty."[8] *Palko v.*

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[8] One of the detested procedures of the infamous Star Chamber was the oath "ex officio mero" by which a judge

Connecticut, supra, 302 U.S. at 319. It would be shocking to the country if the Court were to abrogate the assumed constitutional safeguard of probable cause for a criminal prosecution. It is as "important in our free society" that every individual going about his or her affairs have confidence that the government cannot bring criminal charges without probable cause as it is that the government cannot convict without proof beyond a reasonable doubt. *Winship, supra,* 397 U.S. at 364.

Both the right to be free from conviction except on proof beyond a reasonable doubt and the right to be free from prosecution except upon probable cause are substantive rather than procedural in nature, though part of the process of criminal justice. The requirement of proof beyond a reasonable doubt may spawn procedural requirements, such as the content of a trial court's instructions to the jury or the allocation of the burden of proof at trial. *Mullaney v. Wilbur,* 421 U.S. 684 (1975). But it is itself a substantive safeguard.

Thus, even if a trial proceeds with all the procedural requirements and the trial judge properly instructs the jury on the requirement of proof beyond a reasonable

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summoned an accused before the Court by virtue of his office as judge without regard to the nature or strength of the accusations against him. E.W. Cleary, *McCormick's Handbook of the Law of Evidence;* 244 (2d ed. West 1972); 8 J.H. Wigmore, *Evidence in Trials at Common Law* 275 (Little, Brown 1961); Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination,* 10 Vand. L. Rev. 485, 486-487 (1957). In the inquisitorial system of the Star Chamber the proceeding "ex officio mero" "became a favorite one for heresy trials." Wigmore, *supra.*

doubt, an appellate court will set aside a conviction if it determines that the evidence did not measure up to the substantive standard. *Jackson v. Virginia,* 443 U.S. 307, 317-318 (1979); *Thompson v. City of Louisville,* 362 U.S. 199, 205-206 (1960). The remedy for breach of the substantive requirement of conviction only upon proof beyond a reasonable doubt is not to remand for correction or any perceived procedural deficiency, but to dismiss without any further proceedings, not because it is always unconstitutional to retry a defendant after a reversal of his conviction, for it is not, *United States v. Ball,* 163 U.S. 662, 672 (1892), but because it is always unconstitutional to obtain a conviction with a substantively inadequate basis. Cf. *DeShaney v. Winnebago County,* 489 U.S. 189, 195 (1989).

The requirement of probable cause for a criminal prosecution is of the same substantive character. It is not always unconstitutional for a law enforcement officer to initiate a criminal prosecution but it is always unconstitutional for the officer to do so without probable cause. Even if the officer follows all the proper procedures,[9] if the officer lacks probable cause for the prosecution it violates substantive due process. If the officer lacks probable cause yet obtains the approval of a magistrate or a prosecutor for a warrant, or at a preliminary hearing, or the indictment of a grand jury, the officer has committed a violation of substantive due process, nonetheless.[10] Cf.

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[9] Petitioner does not challenge the Illinois procedures for initiating and processing criminal charges.

[10] As explained in Argument II below, by operation of qualified immunity, an officer would not be liable under §1983

Malley v. Briggs, 475 U.S. 335, 340-342 (1986). A judicial "probable cause *determination* is not a constitutional prerequisite to the charging decision," *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975) (emphasis added), but probable cause is. No matter the extent of the procedure, substantive due process prohibits prosecution without probable cause.

B.

THE FOURTH AMENDMENT'S PROBABLE CAUSE STANDARD AND THE FIFTH AMENDMENT'S GRAND JURY CLAUSE SUPPORT THE DUE PROCESS REQUIREMENT OF PROBABLE CAUSE FOR A PROSECUTION.

The probable cause standard is traditional, familiar and flexible. It is a minimal standard that affords ample discretion for legitimate prosecution decisions. Most officials would prefer to have evidence exceeding the probable cause standard before deciding to initiate a prosecution, *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); see National District Attorneys Association, NATIONAL PROSECUTION STANDARDS, Standard 9.4(A) ("The prosecutor shall file only those charges which he believes can reasonably be substantiated by admissible evidence at trial"), so the probable cause standard is no obstacle to proper governmental action. It is the express standard established in the Fourth Amendment and it is implicit in the Grand Jury Clause of the Fifth Amendment.

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unless the officer acted not only without probable cause but without an objectively reasonable belief in probable cause.

In *Brinegar v. United States*, 338 U.S. 160 (1949), the Court explained:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities.
>
> These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." . . . And, this "means less than evidence which would justify condemnation" or conviction. . . . Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. . . .
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But, the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for

> accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law abiding citizens at the mercy of the officers' whim or caprice.

Id. at 175-176; see also, *Winston v. Lee*, 470 U.S. 753, 759 (1985); *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court elaborated that probable cause is a "common sense" standard that should be judged according to the totality of the circumstances. *Id.* at 230. "Probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232.

The Constitution requires that the probable cause standard must be satisfied before an arrest or search without a warrant may be made, before an arrest or search warrant may issue, and "as a prerequisite" to detention pending prosecution. *Gerstein v. Pugh*, 420 U.S. 103, 111-112, 120, 126 (1975). It is even more appropriate for the more considered and more consequential action to initiate a formal criminal prosecution.

The Fifth Amendment Grand Jury Clause provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . . " Enforcing the probable cause standard has enabled the grand jury to serve "as a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra* 414 U.S. 338, 343 (1974). In *Hurtado v. California*, 110 U.S. 516

(1884), this Court held that the Fifth Amendment provision for grand jury indictment was not a requirement of procedural due process. It did so, however, in the course of reviewing a California procedure for prosecution by information that included a review of the basis for the prosecution by a magistrate who would uphold it only "if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof." *Id.* at 517.

In upholding the prosecution without the grand jury procedure, the Court made clear that due process permits that result only in light of the fact that California had an alternative procedure for "certifying to the *probable guilt* of the defendant." *Id.* at 538 (emphasis added). Thus, the opinion assumed, if it did not hold, that probable cause is the due process standard for a prosecution, though the grand jury procedure is not constitutionally required to enforce that standard.[11]

Decisions following *Hurtado* reviewed cases after they had resulted in criminal convictions and the opinions did not enter into any discussion of the probable cause standard. E.g., *Bolln v. Nebraska*, 176 U.S. 83, 86 (1900); *Hodgson v. Vermont*, 168 U.S. 262, 272 (1897); *Dowdell v. United States*, 221 U.S. 325, 332 (1911). Later, in *Lem*

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[11] *Hurtado* rests on an assumption that any procedure adopted by the states to replace the grand jury would perform an equivalent function . . . and that, therefore, prosecution without probable cause would violate Fourteenth Amendment due process rights."
Wheeler v. Cosden Oil and Chemical Co., 734 F.2d 254, 258 (5th Cir. 1984).

Woon v. Oregon, 229 U.S. 586, 590 (1913), the Court held that the preliminary hearing procedure also is not obligatory upon the states as part of due process. In *Lem Woon*, the defendant had been convicted of murder, so there was no question before the Court about probable cause for the prosecution and the Court did not address the subject.[12] Certainly none of these cases suggested that due process would permit a prosecution to proceed without probable cause. Their concern was exclusively procedural, not substantive, due process.

Thus, though the Constitution does not confine the states to the procedure of the grand jury or dictate to the states the alternative procedure of the preliminary hearing, the core value of the Fifth Amendment Grand Jury Clause that the initiation of a criminal prosecution be based only on probable cause is essential to due process. The states may enjoy flexibility in developing the procedures to enforce that standard within their criminal justice system, yet may not permit prosecutions to proceed with the full force of governmental power without a factual foundation justifying that action that amounts at least to probable cause.

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[12] In *Ocampo v. United States*, 234 U.S. 91, 98 (1914), the Court applied *Hurtado* and *Lem Woon* to the Philippines, in an opinion emphasizing that the law of the territory required probable cause for an information.

II.

SECTION 1983 PROVIDES A REMEDY AGAINST A LAW ENFORCEMENT OFFICER WHO INITIATES AND PURSUES A CRIMINAL PROSECUTION WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN PROBABLE CAUSE.

A.

SECTION 1983 PROVIDES A REMEDY FOR ABUSES OF STATE POWER THAT VIOLATE CONSTITUTIONALLY PROTECTED RIGHTS.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Monroe v. Pape*, 365 U.S. 167, 172 (1961), this Court held that Congress intended §1983 "to give a remedy to parties deprived of constitutional rights . . . by an official's abuse of his position." Section 1983 provides an effective remedy only for a violation of " 'federally protected rights' ", *Maine v. Thiboutot*, 448 U.S. 1, 5 (1980), and "it does not purport to supplant ordinary tort law." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). "Our Constitution deals with the large concerns of the governors and the governed. . . . " *Daniels v. Williams*, *supra*, 474 U.S. at 332. Hence, to establish a §1983 claim a complaint must allege two elements – "and only two" – beyond traditional tort

allegations: first, that the plaintiff's harm was caused by a constitutional violation; secondly, that the defendant responsible for that violation was acting under color of state law. *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1066 (1992); *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); see *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 61 L.W. 4205 (1993).[13]

Because §1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by" the Constitution, *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979), "[t]he first inquiry in any §1983 suit" is "to isolate the precise constitutional violation." *Id*, 140; *Graham v. Connor*, 490 U.S. 386, 394 (1989). In the present case, the constitutional right at stake is the substantive due process right to be free from a prosecution except on probable cause, as described in Argument I. In *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), this Court assumed that §1983 provides a remedy for a deprivation of constitutional rights "in initiating and pursuing a criminal prosecution." The holding in *Imbler* was that "in initiating a prosecution and in presenting the state's

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[13] The complaint in this case pleaded facts that satisfy the objective reasonableness standard as well as the probable cause standard thus satisfying the requirement that plaintiff's harm be caused by a constitutional violation. Cf. *Leatherman, supra*, 61 L.W. at 4206. See also Argument, pp. 36-38, *infra*, and n.18.

case, the prosecutor is immune from a civil suit for damages under §1983." *Id*. In its discussion, the Court assumed that without absolute immunity a prosecutor could be liable in an action under §1983 challenging "his decision to initiate a prosecution." *Id*. at 421, 424-425, 427. The Court observed: "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Id*. at 427.

The *Imbler* assumption was, of course, correct. Section 1983 provides a remedy "against those abuses of state power that violate federal law." *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1065 (1992). As long as the prosecution was undertaken under color of law and deprived the plaintiff of the constitutional right to be free from prosecution except on probable cause, the elements of a §1983 claim are satisfied. *Soldal v. Cook County, Illinois*, 113 S.Ct. 538, 549 (1992); *Collins v. City of Harker Heights, supra; Gomez v. Toledo, supra*. Although a prosecutor enjoys the protection of absolute immunity from such an action, a law enforcement officer or other public official is protected only by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The substantive due process liberty interest in freedom from a baseless prosecution does not enjoy any procedural safeguards as a matter of federal constitutional imperative against the states. A judicial "probable cause determination is not a constitutional prerequisite to the charging decision" except "for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Gerstein v. Pugh*, 420 U.S. 103, 119, 125 n.26 (1975). No grand jury or preliminary hearing

review of the existence of probable cause is constitutionally required. *Hurtado v. California, supra; Lem Woon v. Oregon, supra.* The trial provides an ultimate procedure for the accused to test the basis for the prosecution but it tests whether the prosecution at the time of trial was supported by proof beyond a reasonable doubt, *In re Winship, supra,* and does not test whether the prosecution was initiated on the basis of probable cause.

Whether the prosecution is dismissed before trial or the accused is acquitted after trial, a §1983 action provides the only remedy for the constitutional violation in the initiation and pursuit of the action without an adequate constitutional basis.[14] It is necessary to deter as well as to remedy the constitutional violation.[15] "When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.' " *Anderson v. Creighton,* 483 U.S. 635, 638 (1987). "A 'damages remedy against the

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[14] The remedy under §1983 may, only upon a "showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief," include an injunction against the groundless prosecution. *Younger v. Harris,* 401 U.S. 37, 54 (1971); see *Kugler v. Helfant,* 421 U.S. 117, 124 (1975); *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 611 (1975); *Gibson v. Berryhill,* 411 U.S. 564, 573-574 (1973); *Mitchum v. Foster,* 407 U.S. 225, 230 (1972); see also *Shaw v. Garrison,* 467 F.2d 113 (5th Cir. 1972).

[15] In the case of the §1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy – the person who in fact has done no wrong, and has been [prosecuted] for no reason, or a bad reason." *Malley v. Briggs, supra,* 475 U.S. at 344.

offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.' " *Gomez v. Toledo,* 446 U.S. 635, 639 (1980).

B.

A CRIMINAL PROSECUTION BY A LAW ENFORCEMENT OFFICER WITHOUT PROBABLE CAUSE IS A CONSTITUTIONAL VIOLATION AND SO A BASIS FOR A SECTION 1983 ACTION THOUGH POLICE DISTRIBUTION OF A DEFAMATORY FLYER IS NOT.

The Seventh Circuit in the decision below relied on *Paul v. Davis,* 424 U.S. 693 (1976), to hold that a prosecution without probable cause constitutes a constitutional tort only if the prosecution renders the plaintiff unemployable, subjects him to jail, or forces him to stand trial. 975 F.2d at 346. The Seventh Circuit explained:

> We do not place malicious prosecution in the class of trifling infringements of the rights to be free from oppression by public officers; but in the absence of incarceration or other palpable consequences we do not think it should be actionable as a constitutional wrong. In a case such as this, where the prosecution collapses before trial, just as in the garden-variety public-officer defamation case that does not result in exclusion from an occupation, state tort remedies should be adequate. . . .

Id. at 347.

In *Paul v. Davis,* two police departments circulated to local businesses a flyer containing the names and photographs of persons arrested for or "known to be active in" shoplifting, including Davis. Davis was charged with

shoplifting at the time but the charge was later dismissed.[16] The flyer came to the attention of the newspaper where he worked as a photographer, and he was given a warning but was not discharged or disciplined.

This Court held that Davis' allegations of defamation by the police departments, "standing alone and apart from any other governmental action with respect to him," did not state "a claim for relief under 42 U.S.C. §1983 and the Fourteenth Amendment." 424 U.S. at 694. The Court emphasized that Davis "has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded." 424 U.S. at 700. The Court suggested that although Davis' loss of reputation was not "a deprivation of liberty within the meaning of the Due Process Clause," 424 U.S. at 702, had the police action caused Davis to lose "some more tangible interests such as employment," 424 U.S. at 701, or "government employment," 424 U.S. at 706, §1983 would have afforded a remedy. Accord, *Siegert v. Gilley*, 111 S.Ct. 1789, 1794 (1991).

By contrast, Petitioner does "identify a specific constitutional guarantee safeguarding the interest he asserts has been invaded": the substantive due process freedom from prosecution except upon probable cause. Unlike the police distribution of a flyer about which Davis complained, Petitioner directs his action against the formal, official, and solemn action by a law enforcement officer of initiating and pursuing a criminal action against him.

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[16] The Court's opinion does not suggest that Davis ever contended that there was not probable cause for the shoplifting charge.

Not "every infringement of an interest protected at common law" is a deprivation of a constitutionally protected liberty. 975 F.2d at 346; *Paul v. Davis, supra*, 424 U.S. at 699. All torts of state officials are not constitutional torts, *id.* at 700-701; *Parrat v. Taylor*, 451 U.S. 527, 544 (1981), and all defamations by public officials are not constitutional torts. *Paul v. Davis, supra*, 424 U.S. at 702. Formally invoking the criminal justice process of the state against an individual without an objectively reasonable belief in probable cause to do so by an official, however, is, as explained in Argument I, the paradigm of arbitrariness and oppression in the abuse of governmental power. Such severe governmental action wrongfully employed is itself sufficient to constitute a constitutional violation that is a basis for a §1983 action. A groundless police investigation or surveillance may cause injury to its target, but if no constitutional right is violated that person has no more §1983 claim that did Davis. A criminal prosecution subjects a person to a qualitatively different governmental exercise of power than the distribution of a defamatory flyer.

Section 1983 does not, of course, provide a remedy for a *de minimis* violation, such as a harmless push or shove. *Hudson v. McMillian*, 112 S.Ct. 995, 996 (1992); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). A groundless criminal prosecution of a citizen can never be of that *de minimis* character. This Court has frequently found a constitutionally significant distinction between police investigation and formal prosecution. *United States v. Loud Hawk*, 474 U.S. 302, 310-312 (1986); see also *Doggett v. United States*, 112 S.Ct. 2686, 2693 (1992); *United States v. MacDonald*, 456 U.S. 1, 9 (1982); *United States v. Lovasco*,

431 U.S. 783, 791 (1977); *Dillingham v. United States*, 423 U.S. 64, 64-65 (1975); *United States v. Marion*, 404 U.S. 307, 313 (1971); *Kirby v. Illinois, supra*, 406 U.S. at 689-690.

The filing of a formal charge is a significant governmental action that crosses a threshold that can no longer be harmless. That action implicates a person's interest in reputation, to be sure, but far more it implicates the fundamental liberty interest in freedom from a groundless prosecution. That prosecution may be the cause of many consequences, and they may be devastating, but it is the deprivation of the freedom from prosecution except upon probable cause that is the gravamen of the constitutional violation and the basis for the constitutional tort. The constitutional violation and the constitutional tort are complete upon the formal filing of the criminal charge without probable cause. The collateral consequences that may result – pre-trial detention, loss of employment, expense, anxiety, loss of friends public obloquy – are factors in aggravation. If the prosecution collapses before trial, the wrong is mitigated, but it does not vanish. Petitioner may recover for "out-of-pocket loss and other monetary harms" as well as "such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering.' " *Memphis Community School District v. Stachura*, 477 U.S. 299, 307 (1986). Incarceration, loss of employment, and a full trial would all be factors in aggravation. None is necessary, however, as the constitutional wrong is the filing of the groundless criminal prosecution itself.

All of the Courts of Appeals agree that a groundless prosecution in some form is actionable under §1983. See cases cited in footnote 7, *supra*; see also *Smith v. Gonzales*,

459 U.S. 1005, 1007 (1982) (White, J., dissenting from denial of cert.) ("Section 1983 actions for wrongful arrest and prosecution are frequently brought against police officers"). The Ninth Circuit requires an intent to deprive the accused of equal protection, such as a racial motivation, *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988), and the Eighth Circuit requires some constitutional infringement. *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990). With a clear ruling establishing the substantive due process right to freedom from criminal prosecution except upon probable cause, these reservations would be unnecessary.

Other courts insist that the groundless prosecution must be "egregious." *Morales v. Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990); *Dunn v. Tennessee*, 697 F.2d 121, 122 (6th Cir. 1982). Like the Seventh, Eighth and Ninth circuits, these courts seems to be searching for some way to assure that §1983 will be used to remedy only a violation of "constitutional dimension" and not a " 'garden-variety,' " *Soldal v. Cook County, supra*, 113 S.Ct. at 549 (1992), state law tort that happens to be committed by a public official. The formal filing of a criminal charge, however, invokes a uniquely governmental and severe power over the individual that therefore enjoys substantive protection of the Due Process Clause. There is no need for aggravation to elevate the violation to a constitutional dimension. *Soldal v. Cook County, supra*, 113 S.Ct. at 548. Baselessly charging a person with crime – not informally by flyer – but formally by process is sufficient without more to constitute the violation for it plainly implicates the interests protected by the Due Process Clause.

C.

BY OPERATION OF THE DEFENSE OF QUALIFIED IMMUNITY A LAW ENFORCEMENT OFFICER WOULD BE LIABLE UNDER SECTION 1983 ONLY IF THE OFFICER INITIATES OR PURSUES A CRIMINAL PROSECUTION NOT ONLY WITHOUT PROBABLE CAUSE BUT ALSO WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN PROBABLE CAUSE.

As discussed in Part I(B), the probable standard is both flexible and minimal. A law enforcement officer sued for damages under §1983, however, would be eligible for qualified immunity from suit. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gomez v. Toledo, supra*. Consequently, a law enforcement officer will be answerable for damages under §1983 only if the officer did not have probable cause for a prosecution and no reasonably well-trained officer could have believed he had probable cause. See *Malley v. Briggs, supra*, 475 U.S. at 344-345; *Hunter v. Bryant*, 112 S.Ct. 534 (1991); *Franks v. Delaware*, 438 U.S. 154, 164-165, 171 (1978) (a material deliberate or reckless falsehood by a law enforcement officer may not be considered in establishing probable cause). An officer who files a criminal charge without probable cause and without an objectively reasonable belief in probable cause has committed a constitutional violation of a grave character. No requirement of another constitutional violation, an egregious factor, or a special kind of additional injury is necessary or appropriate.

"As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs, supra*, 475 U.S. at 341; see also *Anderson v.*

Creighton, supra 483 U.S. at 641. In the context of taking action to initiate a criminal prosecution, the objective reasonableness standard would "shield[ ] [the officer] from suit for damages if 'a reasonable officer could have believed [the person's] prosecution to be lawful in light of clearly established law and the information the officer[ ] possessed.' " *Hunter v. Bryant, supra*, 112 S.Ct. at 536. No higher standard, such as malice, is required as the action of initiating a criminal prosecution – unlike, for example, the action of making an arrest – need never be made in an "emergency situation" or " 'in haste, under pressure.' " *Wilson v. Seiter*, 111 S.Ct. 2321, 2326 (1991).[17] On the other hand, "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." *Malley v. Briggs, supra*, 475 U.S. at 341.[18]

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[17] Compare *Graham v. Connor*, 490 U.S. 386, 399 (1989) ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances and subjective concepts like 'malicious' and 'sadism' have no proper place in that inquiry.")

[18] If the prosecutor reviews the information presented by the officer prior to charges being filed, the officer is liable only if the information the officer provides the prosecutor upon which the prosecutor acts is information "no officer of reasonable competence [could] have [submitted to the prosecutor]. . . . " *Malley v. Briggs, supra*, 475 U.S. at 346 n.9. Causation exists because "§1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' " *Malley v. Briggs, supra*, 475 U.S. at 344 n.7.

D.

BECAUSE THE CONSTITUTIONAL VIOLATION CONSISTS OF A VIOLATION OF SUBSTANTIVE, RATHER THAN PROCEDURAL DUE PROCESS, THE SECTION 1983 FEDERAL REMEDY IS AVAILABLE REGARDLESS OF WHETHER THE STATE ALSO PROVIDES A TORT REMEDY.

The Seventh Circuit in the decision below said that the state malicious prosecution remedy "should be adequate and the heavy machinery of constitutional litigation can best be left at rest." *Albright v. Oliver*, 975 F.2d at 347. In *Monroe v. Pape*, 365 U.S. 167 (1961), however, this Court held:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked.

Id. at 183. The Court noted that the federal remedy is necessary where the state law may be inadequate in theory or unavailable in practice, but no showing of such condition is prerequisite to an action under §1983. *Id.* at 173-174.

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 180. As the Court later confirmed:

> We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court. The first Congress created federal courts as the chief – though not always the exclusive – tribunals for enforcement of federal rights.

McNeese v. Board of Education, 373 U.S. 668, 672 (1963); see also *id.* at 674 ("It is immaterial whether respondents' conduct is legal or illegal as a matter of state law.") "Thus overlapping state remedies are generally irrelevant to the existence of a cause of action under §1983." *Zinermon v. Burch*, 494 U.S. 113, 124 (1990).

Where the constitutional violation consists of a deprivation of procedural, rather than substantive, due process, however, this Court has "recognized that postdeprivation remedies made available by the State can satisfy the Due Process Clause." *Parratt v. Taylor*, 451 U.S. 527, 538 (1981). " 'The usual rule has been "[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." ' " *Id.* at 540 (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974)).

In *Parratt*, the plaintiff was a state prisoner who sued to recover the value of hobby materials that he had ordered by mail and that prison officials had lost. 451 U.S. at 529. The State provided a tort claims procedure. *Id.* at 543. The Court held this remedy "sufficient to satisfy the requirements of due process." *Id.* at 544. The Court distinguished *Monroe, supra* and *Estelle v. Gamble* as

involving specific Fourth and Eighth Amendment violations. The Court suggested that the difference is that the Fourth and Eighth Amendments identify particular rights while the prisoner in *Parratt* relied on no right "other than the Due Process Clause of the Fourteenth Amendment *simpliciter*." *Id.* at 536.

The Fourth and Eighth Amendment claims apply to the states only through the Due Process Clause of the Fourteenth Amendment, however, and §1983 provides a remedy for all constitutional violations under color of state law. Thus, the Court must have had in mind a more significant difference. Constitutional rights receive different treatment in accordance with the interest they protect and the character of their protection, not simply their location or source in the Constitution. Cf. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Soldal v. Cook County*, 113 S.Ct. at 548.

The distinction the Court drew was between *substantive* and *procedural* due process claims. See *Daniels v. Williams, supra*, 474 U.S. at 337-338 (Stevens, J., concurring); *Hudson v. Palmer*, 468 U.S. 517, 541 n.4 (1984) (Stevens, with Brennan, Marshall and Blackmun, JJ, concurring and dissenting); *Parratt v. Taylor, supra*, 451 U.S. at 545 (Blackmun, with White, J., concurring), 552-553 (Powell, J., concurring); see also *Ingraham v. Wright, supra* 430 U.S. at 679 n.47. The Court in *Parratt* identified the constitutional wrong before it as the denial of a predeprivation hearing, 451 U.S. at 537, a denial of *procedural* due process. It held that in the circumstances of the case before it the requirements of procedural due process would forgive the denial of a predeprivation hearing as long as the State provided a postdeprivation hearing. 451 U.S. at

538.[19] As long as adequate procedure is still available, no denial of procedural due process has occurred and so

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[19] All of the cases upon which the Court relied for this point, 451 U.S at 538-539, involved procedural due process claims with regard to deprivations of personal property rather than personal liberty. *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Ewing v. Mytinger & Casselbery, Inc.*, 339 U.S. 594 (1950) (seizure of drugs); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (bank seizure); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control orders); *Corn Exchange Bank v. Coler*, 280 U.S. 218 (1930) (assessment of bank shareholders); *McKay v. McInnes*, 279 U.S. 820 (1929) (same); *Ownbey v. Morgan*, 256 U.S. 94 (1921) (same); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (pre-adjudication sequestration of property with disputed ownership); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (IRS summary proceeding to collect taxes from stockholder transferees); *Armstrong v. Manzo*, 380 U.S. 545 (1965) (adoption; denial of notice to father of hearing denies procedural due process despite availability of postdeprivation hearing on motion to set aside decree). "Where only property rights are involved," the Court wrote for example in *Phillips v. Commissioner*, 283 U.S. 589 (1931), "mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Id.* at 596-597. *Parratt*, therefore, said that it is only "takings of property" that it would uphold "without any predeprivation process." 451 U.S. at 541; see also *Hudson v. Palmer, supra*, 468 U.S. 517, 530 (1984); but *see, Ingraham v. Wright*, 430 U.S. 641, 682 (1977) (hearing not required before corporal punishment of student).

In *Lynch v. Household Finance Corp*, 405 U.S. 538 (1972), the Court rejected any "distinction between personal liberties and proprietary rights as a guide to [28 U.S.C.] §1343 (3) jurisdiction," the jurisdictional counterpart to §1983. Of course, "rights in property are basic civil rights." *Id.* at 552. The nature of property rights, however, renders them more readily amenable to procedural due process "at some time after the initial taking," *Parratt v. Taylor*, 451 U.S. at 539, in appropriate circumstances, than rights in personal liberty.

there is no occasion for §1983 to entertain a lawsuit for a constitutional tort.

A procedural violation is complete only if there is not another adequate procedure still available. All *Parratt* held is that in such a case there is yet no constitutional violation: procedural due process is still available. *Zinermon v. Burch*, 494 U.S. 113, 125-126 (1990). If no other procedure is still available, or if it is inadequate – in some cases, for example, because it is postdeprivation, e.g., *Connecticut v. Doehr*, 111 S.Ct. 2105, 2115-2116 (1991); (prejudgment attachment of real estate); *Zinermon v. Burch*, 493 U.S. 113 (1990) (civil commitment); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment replevin); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license and registration); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Sniadach v. Family Finance Corp*, 395 U.S. 337 (1969) (wage garnishment) – even a procedural due process violation is then complete.

Where the constitutional wrong consists of a deprivation of *substantive* rather than procedural due process, however, the violation is complete at the time of the

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This point is illustrated in the Court's recent decision in *Zinermon v. Burch* 494 U.S. 113 (1990). In *Zinermon*, the Court held that "the fact that a deprivation of liberty is involved in this case does not automatically preclude application of the *Parratt* rule." *Id.* at 132. The Court proceeded, however, to hold that the availability of a postdeprivation damages remedy, *id.* at 130 n.15, did not preclude a §1983 action for a denial of procedural due process for a civil commitment without a hearing of a person allegedly incompetent to consent to voluntary admission. *Id.* at 136-139.

initial deprivation. Because the violation is not procedural, no procedure can correct it or cause it to disappear.[20] An unconstitutional arrest is actionable under §1983 though a *Gerstein v. Pugh* state judicial review may halt the violation and state tort law may provide for damages. *Zinermon v. Burch*, 494 U.S. 113, 124-125 (1990). An unconstitutional search is actionable under §1983 though a state court may later order return of all property taken. *Id.; Soldal v. Cook County*, 113 S.Ct. 538 (1992). An unconstitutional police beating or shooting is actionable under §1983 though a state tort remedy may be available. *Graham v. Connor, supra; Tennessee v. Garner*, 471 U.S. 1 (1985). And, an unconstitutional criminal prosecution is actionable under §1983 though a preliminary or grand jury proceeding may conclude the unconstitutional proceeding, though a trial may bring a measure of vindication, and though the state has a malicious prosecution action through which the injured party might sue for damages. Procedure cannot correct a substantive due process violation, though procedure may mitigate the injury from the violation.

A state malicious prosecution action does not purport to be part of the process of the criminal charging decision. By its elements – especially the customary element that the action must have terminated in favor of the plaintiff – malicious prosecution lies only when the

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[20] Petitioner did receive a preliminary hearing that failed to halt the baseless prosecution. Had it done so, however, such action would not have divested his §1983 claim, only mitigated the injury.

wrong is complete. If the wrong is of constitutional quality – meaning only that it consisted of an official under color of state law instituting a criminal prosecution without probable cause (and without an objectively reasonable belief in probable cause) – it is at that point a complete basis for the §1983 action.

Even a dismissal of the criminal prosecution or an acquittal does not vanquish the violation. If the prosecution was baseless, the criminal defendant has still suffered a loss of a constitutional right. Indeed, such a termination in favor of the defendant should be a prerequisite to a §1983 action, as it is generally to a malicious prosecution action, on a *res judicata* theory or an abstention theory under *Younger v. Harris*. See footnote 14, *supra*.

Congress enacted §1983 as a primary federal remedy for constitutional violations. Congress has not conditioned §1983 on a showing of the unavailability or inadequacy of state remedies. Congress has required prior resort to state remedies only in the limited area of prisoner grievance procedures that have received appropriate certification. 42 U.S.C. §1997(e). In cases involving deprivations of procedural rights, generally involving property rights, the availability of state postdeprivation remedies might in appropriate circumstances correct any constitutional deficiency. Where the constitutional violation is substantive in nature and so complete without reference to any procedure that might be required, once it has occurred the violation cannot be corrected by the provision of any form of procedure, and the §1983 remedy is available without regard to state remedies. Where the constitutional violation consists of initiating a criminal proceeding without an objectively reasonable belief that

it is warranted even by the minimal probable cause standard, such an arbitrary abuse of a severe and uniquely governmental power under color of state authority is a reasonable concern of §1983.[21]

The Court is properly concerned to prevent trivialization of §1983, which was designed to remedy fundamental constitutional violations, "to impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1070 (1992); see also, *Parratt v. Taylor, supra*, 451 U.S at 544. That the state may also provide a tort remedy in the form of a malicious prosecution action does not necessarily mean that §1983 would be called into service for a "fairly typical state law claim" that happens to be committed by a state official. *Id.*; see also, *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 202 (1989). On the contrary, it would be employed to serve the substantive due process interest in protecting a right to freedom from prosecution except upon probable cause that is implicit in the concept of ordered liberty. The §1983 action, unlike a malicious prosecution tort action, arises only in the case of a criminal prosecution and only where the wrongful character of the prosecution has a constitutional dimension, that because it was lacking in probable cause it constituted an arbitrary abuse of governmental power. That is the constitutional violation for the §1983 tort action; no other constitutional violation is necessary and

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[21] Because the violation is substantive rather than procedural in character and complete despite the availability of a state postdeprivation tort remedy, there is no need to consider the rationale of *Zinermon, supra*, 494 U.S. at 136-138.

no aggravating or egregious features are required. If an officer initiates a criminal prosecution without an objectively reasonable basis, that is itself an abuse of governmental power.

CONCLUSION

For the foregoing reasons, the judgment affirming the dismissal of the complaint for failure to state a §1983 claim should be reversed, and the case should be remanded for further proceedings on the §1983 claim.

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Court, U.S.
FILED
JUN 25 1993
OFFICE OF THE CLERK

No. 92-833

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEVIN ALBRIGHT,

Petitioner,

v.

ROGER OLIVER, individually and in his official capacity as police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation, and the CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A POLICE OFFICER WHO CONTRIBUTES TO THE FILING OF A CRIMINAL CHARGE WITHOUT PROBABLE CAUSE DEPRIVES THE ACCUSED OF A FUNDAMENTAL LIBERTY PROTECTED BY PRINCIPLES OF SUBSTANTIVE DUE PROCESS.

II. ASSUMING THE ACCUSED ENJOYS A FUNDAMENTAL RIGHT TO BE CHARGED ONLY UPON PROBABLE CAUSE, WHETHER THE NEGLIGENT OR GROSSLY NEGLIGENT FAILURE TO ASCERTAIN THE ABSENCE OF PROBABLE CAUSE VIOLATES PRINCIPLES OF SUBSTANTIVE DUE PROCESS.

III. ASSUMING PETITIONER HAS STATED A VALID SUBSTANTIVE DUE PROCESS CLAIM, WHETHER A POLICE OFFICER SHOULD BE HELD LIABLE FOR THE PROSECUTOR'S INDEPENDENT ACT OF FILING A CRIMINAL CHARGE ABSENT ALLEGATIONS THAT THE OFFICER FALSIFIED OR WITHHELD EVIDENCE FROM THE PROSECUTOR.

IV. WHETHER PETITIONER'S FAILURE TO FILE HIS CIVIL RIGHTS CLAIM WITHIN TWO YEARS OF THE FILING OF THE CRIMINAL CHARGE BARRED HIS CLAIM UNDER THE STATUTE OF LIMITATIONS.

V. WHETHER THE DOCTRINE OF QUALIFIED IMMUNITY SHIELDS OFFICER OLIVER FROM DAMAGES LIABILITY.

VI. WHETHER PETITIONER ADEQUATELY ALLEGED A CLAIM FOR MUNICIPAL LIABILITY AGAINST THE CITY OF MACOMB.

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No. 92-833

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEVIN ALBRIGHT,

Petitioner,

v.

ROGER OLIVER, individually and in his official capacity as police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation, and the CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

In March, 1987, Veda Moore approached City of Macomb, Illinois Police Officer Roger Oliver, and other police detectives, seeking protection from a narcotics dealer with whom she had been associated (App. 38a, para. 10).[1] At the time of this request, Moore had just completed a thirty day stay in a narcotics treatment center (App. 39a, para. 11).

Officer Oliver allegedly agreed to provide Moore with protection in return for her services as an informant against drug dealers operating in Macomb (App. 38a-40a, paras. 10-12). Specifically, Moore would first identify drug dealers, and then purchase narcotics from those dealers with funds provided by the Macomb Police Department (App. 39a, para. 12). In addition, Officer Oliver agreed to pay Moore between $50.00 and $75.00 for each transaction she completed (App. 39a, para. 12).

Pursuant to this arrangement, Moore advised Officer Oliver on July 17, 1987, that she had just purchased cocaine from John Albright, Jr., in room 212 of the Pace Hotel in Macomb (App. 40a, para. 13). Moore turned a substance over to the police and it was tested by the Illinois State Police Crime Lab (App. 40a, para. 14). On September 2, 1987, Officer Oliver was advised that the substance was, in fact, baking powder (App. 40a, para. 14).

On September 10, 1987, Officer Oliver related Moore's version of the transaction to a McDonough County Grand Jury, and allegedly testified that John Albright, Jr., was, therefore, guilty of selling a "look-alike" substance (App.

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[1] All citations to "App." refer to Appendix A to Petitioner's Petition for a Writ of Certiorari.

40a, para. 15). As a result of that testimony, the grand jury returned an indictment, and an arrest warrant was thereupon issued for John Albright, Jr., by the Circuit Court of McDonough County (App. 41a, para. 15).

Officer Oliver went to John Albright, Jr.'s home to execute the warrant on September 28, 1987, and discovered that Albright was a 60 year old pharmacist who did not appear to be the person Oliver was seeking (App, 41a, para. 16). At that time, Mrs. Albright told Officer Oliver that the Albrights had two sons, Kevin and John David, and that perhaps Oliver was looking for John David (App. 41a, para. 16; Petitioner's Brief, p. 5).

Later that same day, Officer Oliver scratched John Albright, Jr.'s name from the arrest warrant and inserted the name John David Albright (App. 41a, para. 17). After hearing of the existence of the warrant, John David travelled to Macomb from Chicago, Illinois (App. 42a, para. 18). Upon arrival in Macomb on October 1, 1987, John David met Officer Oliver at the police station and explained that he had been working in Chicago for the previous year, including July 17th, the date on which Ms. Moore claimed to have purchased cocaine at the Pace Hotel (App. 42a, para. 18).

With John David still present, Officer Oliver telephoned Veda Moore, who was by then living in Florida (App. 42a, para. 19). Officer Oliver advised Moore that neither John Albright nor his son John David could have purchased a substance from her on July 17th, and inquired "whether or not it might have been Kevin Albright" (App. 42a-43a, para. 19). Moore confirmed that it was indeed Kevin from whom she had purchased the substance (App. 43a, para. 19).

Two weeks later, on October 16, 1987, Officer Oliver attested to a criminal information charging Petitioner with

the sale of a look-alike substance (App. 43a, para. 20). *See* Ill.Rev.Stat. ch. 56½, para. 1404(b) (1987).[2] Under Illinois law, felonies may be charged either by grand jury indictment or by the state's attorney's filing of an information. Ill.Rev.Stat. ch. 38, paras. 111-2(a) & 111-3(b) (1987). After the information was filed, Officer Oliver changed the arrest warrant, this time to reflect the name "Kevin Albright" (App. 43a-44a, para. 21). Upon learning of the existence of the criminal information and the warrant for his arrest, Petitioner surrendered to Officer Oliver on October 19, 1987, and denied any involvement in the crime (App. 44a, para. 22).

Pursuant to the warrant, Officer Oliver then caused Petitioner to be arrested on bail of $3,500.00 (App. 44a, para. 22). Petitioner posted a $350.00 bond in accordance with Illinois law, and was released pending trial subject to the statutory conditions of his bond (App. 44a, para. 22). One condition was that he could not leave the State of Illinois without leave of court (App. 44a, para. 22). *See* Ill.Rev.Stat. ch. 38, para. 110-10(a)(3) (1987).

At the time, Petitioner was a senior in college and asked his lawyer if he could travel to St. Louis, Missouri for job interviews (App. 45a, para. 23). After his lawyer told him of the cost involved in seeking the court's permission to leave the State, Petitioner chose not to pursue the matter (App. 45a, para. 23).

On January 5, 1988, Officer Oliver testified at a preliminary hearing in *People v. Kevin Albright* (App. 45a-46a,

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[2] The Illinois Revised Statutes were recodified under the designation Illinois Compiled Statutes (ILCS), effective January 1, 1993. Because all events giving rise to Petitioner's complaint occurred well before recodification, Respondents will cite to the 1987 Illinois Revised Statutes throughout this brief.

para. 24). Petitioner alleges that Officer Oliver "recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified"[3] (App. 46a, para. 24). Petitioner further alleges that Officer Oliver recklessly did not advise the court that John Albright, Jr., and John David Albright, were initially accused of the same offense (App. 46a, para. 24; Petitioner's Brief, p. 7). The state circuit court found probable cause and allowed the criminal information to stand (App. 46a, para. 24).

On June 27, 1988, the circuit court dismissed the information on the grounds that it did not state an offense under Illinois law (App. 46a, para. 25). Ultimately, prosecutions which had been instituted against over fifty other individuals on the basis of information provided by Moore were aborted or dismissed (App. 39a-40a, para. 12). The arrest and prosecution of Petitioner was widely reported in the media (App. 46a, para. 26).

Approximately three years after his arrest, and almost two years to the day following the dismissal of the criminal charge, Petitioner filed the instant civil rights lawsuit against Officer Oliver and the City of Macomb pursuant to 42 U.S.C. § 1983 (App. 3a). Petitioner sued the City for funding the investigation and for its delegation of responsibility for the investigation to Officer Oliver and the police department (App. 36a-37a, paras. 3 & 8).

[3] Though Respondents understand the strictures of Fed.R.Civ.P. 12(b)(6), they nonetheless deny Petitioner's allegations of wrongdoing, and respectfully request that any opinion rendered by the Court reflect that denial.

SUMMARY OF THE ARGUMENT

Petitioner posits that the filing of a criminal charge without probable cause deprives the accused of a fundamental liberty which is protected under principles of substantive due process. Though state law vests Illinois prosecutors with the exclusive discretion to file a criminal charge, Petitioner contends that recovery is appropriate under § 1983 against a police officer who contributes to the filing of a charge. Petitioner's theory is problematic in several respects.

Beginning with the text, neither the Constitution nor the Bill of Rights set forth a right to be criminally charged only upon probable cause. The fourth amendment requirement of probable cause applies only to searches and seizures, and would have supported a viable false arrest claim had Petitioner filed his complaint on time. He did not (App. 4a). Therefore, the statute of limitations left Petitioner with no choice but to link his § 1983 claim to the date the charge against him was dismissed, rather than the day he was arrested.

Accomplishing this task under the umbrella of substantive due process encounters several obstacles. Substantive due process is applied in the context of individual rights only to prohibit egregious misconduct which "shocks the conscience" or intrudes upon rights "implicit in the concept of ordered liberty." *See Rochin v. California*, 342 U.S. 165 (1952); *Palko v. Connecticut*, 302 U.S. 319 (1937). It has traditionally been utilized to protect the sanctity of marriage and the family, and the right to bodily integrity. Rarely have principles of substantive due process attached to the criminal justice process, where the fourth, fifth, sixth and eighth amendments provide ample protections to arrestees, criminal defendants, and convicted

criminals. The doctrine has never been applied in that context when the sole purpose of recognizing a fundamental liberty was to give rise to a damages claim under § 1983.

Effectively a damages remedy is all that Petitioner seeks. Indeed, he does not challenge the principle that a criminal defendant is not, absent detention or some other significant restraint on liberty, entitled to a determination of probable cause to prosecute. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); *Lem Woon v. Oregon*, 229 U.S. 586 (1913). Thus cast in its proper light, Petitioner's substantive due process claim focuses on post-deprivation damages rather than a preventative safeguard, and, therefore, is nothing more than a masked procedural due process claim. In that respect, the common law tort of malicious prosecution is an adequate state remedy, and it need not be expanded upon in the form of a § 1983 substantive due process claim. *See Paul v. Davis*, 424 U.S 693 (1976); *Parratt v. Taylor*, 451 U.S. 527 (1981).

The qualitative difference between the intrusion on privacy occasioned by the mere filing of a charge, and an arrest, supports the fourth amendment's restriction of probable cause to the latter. While the formal accusation of crime causes substantial anxiety, stress and perhaps damage to reputation, it does not constitute a tangible restraint on liberty in the way that a search or seizure does. Indeed, the Constitution has never been interpreted to encompass every disruption caused by the government, even when the effects of the intrusion are devastating. *See, e.g., Paul v. Davis*, 424 U.S. 693 (1975).

Even if the Court holds that probable cause is a constitutional prerequisite to the charging decision, a substantive due process claim cannot be sustained simply because a police officer allegedly failed to discern an informant's

obvious unreliability. Yet that is all Petitioner alleges in the instant case. Sanctioning such a claim would permit liability for negligence, in contravention of a long line of precedent restricting substantive due process violations to deliberate or intentional misconduct. *See, e.g., Daniels v. Williams*, 474 U.S. 327 (1986).

Holding police officers civilly responsible for a prosecutor's filing of a criminal charge is also problematic under principles of causation and public policy. Prosecutors, rather than police officers, are charged by statute with the authority to institute criminal prosecutions. To guard against the risk that the charging decision will be skewed by the threat of civil liability, prosecutors enjoy absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Allowing police officers to be held responsible for the prosecutor's filing of charges undermines the purposes of that immunity and encourages police officers to exert substantial influence over the charging decision. For that reason, the courts of appeals agree that police officers should not generally be held liable for the charging decision, unless they falsify or withhold evidence from the prosecutor which taints the integrity of the charging decision. Petitioner makes no such allegation in the instant case.

In the event the Court concludes that Petitioner has stated a viable substantive due process claim, his claim should be barred, nonetheless, by the statute of limitations. A federal civil rights claim accrues on the date the plaintiff first has reason to know of the injury which was caused by the challenged conduct. In this case, Petitioner concedes that "[t]he constitutional violation and the constitutional tort are complete upon the formal filing of the criminal charge without probable cause" (Petitioner's Brief, p. 34). Accordingly, Petitioner's substantive due

process claim accrued on the date the charge was filed against him, rather than when it was dismissed eight months later.

Finally, both Officer Oliver and the City of Macomb enjoy alternative reasons for affirming the court of appeals. Officer Oliver is entitled to qualified immunity from damages liability. Even if Petitioner has sufficiently pled a substantive due process claim, the uncertainty of the constitutional framework for that claim prevents any such right from being deemed clearly established. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In addition, Petitioner's contention that the City of Macomb improperly funded the narcotics investigation fails to support a claim for municipal liability. The City's liability is dependent upon proof that Petitioner was injured as a result of a municipal custom, practice or policy. *See Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658 (1978). Permitting a municipal entity to be held liable for merely funding a police operation would be tantamount to imposing liability under a theory of *respondeat superior*, in contravention of this Court's holding in *Monell*.

ARGUMENT

I.

SUBSTANTIVE DUE PROCESS IS NOT INFRINGED WHENEVER A POLICE OFFICER CONTRIBUTES TO THE FILING OF A CRIMINAL CHARGE WITHOUT PROBABLE CAUSE

A. Introduction

Before addressing Petitioner's substantive due process theory, it is useful to identify the constitutional claim which was indisputably available to Petitioner. Officer Oliver's alleged arrest of Petitioner without probable cause set forth a plausible fourth amendment claim based upon an unreasonable seizure (App. 3a). That claim, however, was time-barred (App. 4a).

Accordingly, Respondents do not argue that the Civil Rights Act fails to provide a remedy for the conduct complained of by Petitioner. Rather, the remedy should simply be in the nature of a fourth amendment false arrest claim, as opposed to a substantive due process claim based upon an implied fundamental liberty to be free of a formal accusation of crime without probable cause. *Cf. Graham v. Connor*, 490 U.S. 386 (1989) (excessive force in arrest defined as unreasonable seizure under fourth amendment rather than by generalized notions of substantive due process).

B. General Substantive Due Process Principles

The concept of due process includes both a procedural and a substantive component. *See, e.g., Collins v. City of Harker Heights, Tex.*, 112 S.Ct. 1061, 1068 (1992). Procedural due process requires the government to implement fair procedures when it deprives a person of life, liberty

or property. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Substantive due process, being something of a misnomer (*see Saukstelis v. City of Chicago*, 932 F.2d 1171, 1173 (7th Cir. 1991)), is less well-defined, but it essentially prevents the government from intruding upon fundamental liberties, regardless of the fairness of any procedures it provides. *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2804-07 (1992). In the instant case, Petitioner concedes the adequacy of Illinois' "procedures for initiating and processing of criminal charges" (Petitioner's Brief, p. 21 n. 9). Accordingly, he rests his case on substantive due process.

The prime examples of fundamental liberties are those which are delineated in the Bill of Rights, and are incorporated against the states through the fourteenth amendment. *See Collins*, 112 S.Ct. at 1068. *See also Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating fourth amendment). Though the concept of substantive due process has occasionally been applied to a small batch of fundamental liberties beyond those set forth in the Bill of Rights (*see Planned Parenthood*, 112 S.Ct. at 2804-05), the undefined boundaries of this unchartered area have led the Court to tread quite cautiously when asked to expand the doctrine. For the most part, its protections have encompassed matters relating to marriage and family, and the right to bodily integrity. *See Planned Parenthood*, 112 S.Ct. at 2805-06 (cataloging cases); *Collins*, 112 S.Ct. at 1068. Furthermore, the role occupied by substantive due process in the context of protecting individual rights has traditionally been limited to those egregious forms of governmental conduct which "shock the conscience" (*Rochin v. California*, 342 U.S. 165 (1952)) or which intrude on rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). These principles of judicial restraint require the Court to carefully

"focus on the allegations in the complaint to determine how petitioner describe[s] the constitutional right at stake" before applying substantive due process protections in a new context. *Collins*, 112 S.Ct. at 1068. *See also Reno v. Flores*, 113 S.Ct. 1439, 1447 (1993).

In this case, Petitioner posits that the filing of a felony charge without probable cause deprives the accused of a fundamental liberty interest which is redressable under 42 U.S.C. § 1983 against a police officer who contributed to the filing of the charge. Petitioner's theory cannot be sustained for three alternative reasons: (1) the concept of probable cause as a prerequisite to the filing of a criminal charge is not, absent incarceration or some other tangible restraint on liberty, a fundamental right protected by substantive due process; (2) the negligent or grossly negligent filing of a criminal charge without probable cause is not sufficiently egregious misconduct to implicate substantive due process; and, (3) based on principles of causation and public policy, a police officer should not be held civilly responsible for a prosecutor's independent act of filing a criminal information in the absence of allegations that the officer falsified or withheld evidence from the prosecutor which tainted the charging decision.

C. The Constitution Does not Require Probable Cause to Accompany the Filing of a Criminal Charge Absent Incarceration or some other Significant Restraint on Liberty

1. The Text of the Constitution Does Not Condition the Filing of a Criminal Charge upon Probable Cause

The starting point for analysis of Petitioner's substantive due process theory must be the text of the Constitution and the Bill of Rights. The phrase "probable cause" is confined to the fourth amendment, which protects against

unreasonable searches and seizures. U.S. CONST. Amend. IV. With respect to the filing of criminal charges, however, the fourth amendment is silent.

The only textual reference to the filing of criminal charges is the fifth amendment's grand jury clause. U.S. CONST. Amend. V. The fifth amendment right to be charged only upon grand jury indictment applies, on its face, to "capital or otherwise infamous crimes," but it is not a fundamental right binding on the states. *See Hurtado v. California*, 110 U.S. 516, 538 (1884).

Petitioner thus recognizes that neither the fourth amendment's probable cause requirement nor the fifth amendment's grand jury clause set forth a constitutional right to be charged only upon probable cause. Instead, Petitioner contends that reading those constitutional provisions in conjunction with our nation's tradition of prosecuting only upon probable cause supports recognition of a fundamental liberty protected by the concept of substantive due process. However, analysis of the fourth and fifth amendments along with the remainder of the Bill of Rights, and the tradition of initiating charges only upon probable cause, warrants adherence to principles of judicial restraint which guide substantive due process jurisprudence.

2. Neither the Fourth Nor Fifth Amendments Support a Due Process Guarantee to be Criminally Charged Only Upon Probable Cause

From a fourth amendment perspective, Petitioner's proposal of a fundamental liberty interest to be charged only upon probable cause, conflicts with the Court's conclusion that the charging decision does not constitute a sufficient deprivation of liberty to require a determination of probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 118-19, & 125 n. 26 (1975). *See also Lem Woon v. Oregon*, 229 U.S. 586

(1913). Only when an accusation of crime causes a significant "restraint on liberty other than the condition that [the accused] . . . appear for trial" does the fourth amendment's prohibition against unreasonable seizures require a determination of probable cause. *Gerstein*, 420 U.S. at 125 n. 26.

This straightforward proposition of law recognizes that it is not the mere accusation of crime, but rather, the state's confrontation and restraint of the person through arrest or detention, which constitutes a seizure within the grasp of the fourth amendment. An arrest interrupts an individual's freedom of movement, interferes with his ability to conduct his daily affairs, and subjects him to the indignities of being fingerprinted, photographed, and otherwise physically processed through the booking procedure. Detention pending disposition of the charges constitutes an even more intrusive physical disruption by depriving the defendant of his home, his family, his ability to earn a living—indeed his freedom.

The filing of a criminal charge, by contrast, "is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined." 4 W. Blackstone, *Commentaries* 300 (1769) (describing an indictment). Such a charge does not, of itself, adjudicate anything, nor does it restrict an individual's movement, his bodily integrity, his freedom to earn a living, his association with family and friends, or his enjoyment of his possessions. Absent incarceration, the accused enjoys a relatively unimpaired existence, although often burdened with some harm to reputation, and with anxiety and stress over the possible disposition of the charges. Thus, the less tangible impact on liberty associated with the filing of charges, in contrast to arrests and detentions, fully supports limiting the reach of the fourth amendment to situations involving the latter. *See Gerstein*, 420 U.S. at 125 n. 26.

Certainly the "wrenching disruption of everyday life" associated with the spector of criminal charges is significant to the accused. *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 814 (1987). The uncertainty of the potential disposition of the charges can be frightening. Nonetheless, neither the person nor his possessions are physically invaded by the filing of charges, and the Constitution has never been interpreted to provide protections against every gut-wrenching intrusion occasioned by the government. *See United States v. Dionisio*, 410 U.S. 1, 10 (1973) (subpoena to testify before grand jury does not implicate fourth amendment); *United States v. Mara*, 410 U.S. 19 (1973) (same).

The right to protect one's good name, for example, "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Indeed, "[a] good name is rather to be chosen than great riches." Prov. 22:1. Nonetheless, the government's defamation of an individual is not a constitutional wrong in the absence of a more tangible deprivation of liberty, typically in the form of a termination of government employment. *Paul v. Davis*, 424 U.S. 693 (1976). Like defamation, the stress, anxiety, and harm to reputation occasioned by the filing of a criminal charge does not constitute a tangible deprivation of liberty which warrants recognition of an implied fundamental right under the substantive component of the due process clause.

In conjunction with the lesser intrusion on liberty caused by the filing of a charge, the wide array of procedural safeguards uniquely available to the criminal defendant further minimizes the need to restrict the state's charging decision under the guise of substantive due process.

Prior to being charged, the fourth amendment provides essentially the sole constitutional buffer between the citizen and arbitrary searches or seizures. The criminal defendant, by contrast, enjoys rights under the sixth amendment to counsel, to compulsory process, to confront witnesses against him, to be notified of the nature of the charges, and to a speedy and fair jury trial. U.S. CONST. Amend. VI. "Every procedural safeguard [contained in the Bill of Rights] made it more difficult for the Government to convict those it accused of crimes." *Green v. United States*, 356 U.S. 165, 216 (1958) (Black, J., dissenting).

These expansive procedural safeguards support the notion that the fourth amendment's silence with respect to the filing of charges was not an oversight. To the contrary, the fourth amendment provides a check against those intrusions on privacy which cannot be undone through the judicial process. The sixth amendment, by contrast, provide the constitutional protections for the unjustly accused.[4]

Nor does the fifth amendment's grand jury clause support Petitioner's theory. The fifth amendment right to a grand jury is the only constitutional provision referencing the charging decision, and it applies to "capital or otherwise infamous crimes." U.S. CONST. Amend. V.[5] The Court, however, has refused to recognize the grand jury as a

[4] The right to trial by jury is found not only in the Bill of Rights, but also in the text of the Constitution. U.S. CONST. Art. III, Sec. 2.

[5] The limitation to "capital or otherwise infamous crimes" was originally interpreted to encompass crimes punishable by loss of life or incarceration with hard labor. *Ex Parte Wilson*, 114 U.S. 417 (1885). Shortly thereafter, the limitation was broadened to include all crimes punishable by imprisonment. *Mackin v. United States*, 117 U.S. 348 (1886).

fundamental right applicable against the states. *Hurtado v. California*, 110 U.S. 516, 538 (1884). Though *Hurtado* relied, in part, on the State of California's substitution of an "examination and commitment by a magistrate" for the role of the grand jury, the Court has repeatedly confirmed that due process is satisfied even when the state authorizes criminal prosecutions to be charged by information without any judicial determination of probable cause. *Lem Woon v. Oregon*, 229 U.S. 586 (1913); *Gerstein*, 420 U.S at 118-19. *See also Beck v. Washington*, 369 U.S. 541, 545 (1961). In such cases, the state's decision to vest the power to formally accuse in a designated representative (i.e., the prosecutor), does not trigger constitutional scrutiny so long as the defendant is not detained or subjected to some other significant restraint on liberty which implicates the fourth amendment's prohibitions against unreasonable seizures. *See Gerstein*, 420 U.S. at 118-119 & 120 n. 26.

Petitioner argues that *Hurtado*, *Lem Woon*, *Beck* and *Gerstein* are inapposite because they concern only a question of procedure, rather than of substance (Petitioner's Brief, pp. 25-26). Those cases, according to Petitioner, only permit the states to forego the procedural determination of probable cause when the defendant is not detained pending resolution of the charge. An underlying substantive right to be charged only upon probable cause thus remains intact under Petitioner's theory.

It is inconsistent, however, for Petitioner to argue that the right to be charged only upon probable cause is so "implicit in the concept of ordered liberty" to be ranked as fundamental, but that it is not fundamental enough to require a procedural safeguard to ensure that probable cause is present. Such a contention is tantamount to saying that the right is fundamental only for purposes of supporting a § 1983 claim for damages. Indeed, Petitioner's contention that the need for a procedural safeguard is irrelevant to the existence of an underlying fundamental substantive right ignores the fact that the very purpose of the fourth amendment is to ensure that the "existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Gerstein*, 420 U.S. at 112-13. *See also Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

Never before has the Court expanded the boundaries of substantive due process for the sole purpose of accommodating a § 1983 damages claim on behalf of an aggrieved individual. To the contrary, the Court's decisions expanding fundamental liberties beyond those contained in the Bill of Rights have been carefully circumscribed to prevent the states (traditionally in the context of family and bodily integrity) from intruding upon important privacy interests deemed essential to ordered liberty. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (prohibition on contraceptives); *Rochin v. California*, 342 U.S. 165 (1952) (stomach pumping to extract evidence); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marriage).

In essence, the fundamental right Petitioner advocates would serve only a remedial, rather than a preventative purpose. The state may prosecute a person without probable cause, Petitioner posits, so long as the Constitution and § 1983 afford a post-deprivation damages remedy. With its focus on post-deprivation damages, rather than pre-deprivation prevention, Petitioner's substantive due process theory is revealed as a disguised procedural due process claim. That being the case, the states' common law tort of malicious prosecution suffices, and a damages remedy need not be provided under § 1983. *See Parratt v. Taylor*, 451 U.S. 527 (1981).

3. Our Nation's Tradition of Conditioning the Filing of a Criminal Charge Upon Probable Cause is not a Fundamental Liberty Protected by Substantive Due Process

Petitioner accurately points out that the "minimal standard in all jurisdictions for the decision to bind a defendant over for a felony is probable cause," and that a prosecutor acts unprofessionally when he recommends that an indictment be returned without probable cause (Petitioner's Brief, p. 16). These facts alone, however, do not warrant the elevation of that practice to the status of a fundamental liberty. The government's defamation of a person, for example, is both unprofessional and illegal in all 50 states. Nonetheless, defamation does not, despite its dire consequences, deprive an individual of a fundamental liberty protected under the due process clause. *Paul v. Davis*, 421 U.S. 693 (1976). *See supra*, p. 14.

Certainly, national tradition is relevant to recognition of a fundamental liberty. *See In re: Winship*, 397 U.S. 358 (1970). However, focusing solely upon the fact of the tradition rather than the underlying justification for its existence risks turning the Constitution into a guarantor of all practices prescribed by the states. This, of course, is not the law. *See Davis v. Scherer*, 468 U.S. 183 (1984). Only by examining the interests protected by the states' practice can it fairly be determined whether that tradition is deserving of constitutional recognition.

From a constitutional perspective, the interest protected by attaching a requirement of probable cause to the filing of criminal charges is the right to be free of incarceration or other significant restraint on liberty. *See Gerstein*, 420 U.S. at 114. Indeed, several states, including Illinois, have recognized that a statutory probable cause requirement is triggered only when the filing of charges serves

as the basis for an arrest warrant. *See, e.g., People v. Harding*, 34 Ill.2d 475, 216 N.E.2d 147 (1966); *State v. Fields*, 119 N.H. 249, 400 A.2d 1175 (1979); *State ex rel. Purcell v. Superior Court*, 109 Ariz. 460, 511 P.2d 642 (1973). When a criminal complaint is filed independently of or after an arrest, its "function is informational," and the privacy interests protected under the Constitution are not implicated. *Fields*, 400 A.2d at 1177. The states' recognition of the Constitution's limited role in relation to statutory probable cause requirements thus undercuts Petitioner's efforts to achieve constitutional recognition of a fundamental liberty to be charged only upon probable cause.[6]

Respondents do not suggest that a requirement of probable cause is an unimportant or an unwise prerequisite to the filing of charges. To the contrary, such a limitation fairly balances the state's interests in fighting crime with the individual's interest in remaining free from the unjust accusation of a crime. Nonetheless, probable cause should be a matter of constitutional magnitude only when the governmental conduct causes a tangible loss of liberty, such as through incarceration, or a search or seizure. In other cases, the states should be left to police their probable cause requirement through their own statutes and common law traditions. Principles of federalism, therefore, encourage deference to the states given the states' uniform recognition of a common law tort claim to re-

[6] As a practical matter, *Gerstein*'s requirement of probable cause for all detained defendants compels the states to apply a standard of probable cause to the filing of all felony charges. Indeed, the state does not know in advance which criminal defendants will make bail, and which will not. Accordingly, recognition of a fundamental liberty to be charged only upon probable cause will not impact in any fashion on the procedural safeguards available to criminal defendants in the various states.

dress the wrongs for which Petitioner seeks a constitutionally based remedy. *See generally*, Annotation, *Malicious Prosecution—Probable Cause*, 14 ALR2d 264 (1950) (reviewing common law malicious prosecution). This view is consistent with this Court's recognition that the fourteenth amendment should not function as a "font of tort law to be superimposed upon whatever systems may already be administered by the states." *See Paul*, 424 U.S. at 701. *See also Baker v. McCollan*, 443 U.S. 137 (1979) (common law tort of false imprisonment not of constitutional magnitude simply because the defendant is a public official).

4. Recognition of a Constitutional Right to be Free From Conviction Except Upon Proof Beyond a Reasonable Doubt Does Not Support Recognition of a Fundamental Right to be Criminally Charged Only Upon Probable Cause

As previously discussed, the Court should examine the interests advanced under a national tradition to determine whether that tradition is deserving of constitutional recognition. In identifying a fundamental right to be free from conviction absent proof beyond a reasonable doubt, the Court has reasoned that the purpose of that standard was to "safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *In re: Winship*, 397 U.S. 358, 362 (1970), *quoting Brinegar v. United States*, 338 U.S. 160, 174 (1949). Thus, elevation of that common law tradition to constitutional status was "deemed essential for the protection of life and liberty." *Id.* at 362, *citing Davis v. United States*, 160 U.S. 469, 488 (1895). Indeed, the criminal justice system's constitutional safeguards, including the rights to counsel, to a fair jury trial, to confront adverse witnesses, and to compulsory process, would mean little if the jury could convict on a hunch, whim or even a preponderance of the evidence.

The right to be free of an unjust criminal accusation, by contrast, has never been viewed on a plane with the right to avoid unjust conviction. As noted above (*see supra*, pp. 13-15), the mere filing of charges simply constitutes a qualitatively less intrusive interference with privacy interests than does conviction of a crime. Indeed, a primary focus of the Bill of Rights was to protect the unjustly accused from the risk of an unjust conviction. *See, e.g., Green v. United States*, 356 U.S. 165, 216 (1958) (Black J., dissenting). The Bill of Rights was not crafted, however, to provide the same level of protections against being accused in the first instance.

The chasm between the interests protected in *Winship* and those implicated by the filing of a criminal charge is perhaps best illustrated by *Gerstein*'s recognition that the charging decision is not reviewable. *Gerstein*, 420 U.S. at 118-19. It would be unthinkable, by contrast, to suggest that, while the states must condition criminal convictions on the presence of proof beyond a reasonable doubt, that they need not provide the safeguard of a jury trial to ensure that the standard is satisfied. If safeguarded only by the availability of a post-conviction damages remedy, the right to be free from conviction except upon proof beyond a reasonable doubt would be an illusory entitlement indeed. Similarly, if Petitioner's purported right to be charged only upon probable cause was truly worthy of constitutional recognition, then *a fortiori*, it would be deserving of a procedural safeguard, rather than only a § 1983 post-deprivation damages remedy.

Petitioner's related contention that "prosecution without probable cause unreasonably puts an accused at risk of wrongful conviction" is similarly untenable (*See* Petitioner's Brief, p. 19). That argument also ignores the fact that the Bill of Rights is replete with safeguards designed

to ensure that the unjustly accused is not unjustly convicted. The difference between the standards of probable cause and proof beyond a reasonable doubt is so great that it is unreasonable to presume that a person prosecuted without probable cause risks conviction under the more stringent standard in the absence of affirmative efforts to corrupt the trial process.

The Constitution has been interpreted, of course, to protect the accused from efforts to corrupt the truth-seeking process of the criminal justice system. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963) (duty to disclose exculpatory evidence); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (bad faith failure to preserve evidence violates due process). Indeed, the trial process was created to prevent unjust convictions. The charging process, by contrast, serves more as an initial screening device than as a protection against the risk of unjust conviction. *See United States v. Williams*, 112 S.Ct 1735 (1992) (describing role of grand jury). Therefore, the accused has no constitutional right to be criminally charged only upon probable cause absent incarceration or some other tangible restraint on liberty.

D. Assuming Probable Cause is a Constitutional Prerequisite to the Filing of a Criminal Charge, The Due Process Clause is not Implicated by Negligent Governmental Conduct

Principles of due process are intended to "secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986), *quoting Hurtado v. California*, 110 U.S. 516, 527 (1884). For that reason, the concept has traditionally been applied only to redress "deliberate decisions of governmental officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 332. Mere negligence is never enough. *Id.* Petitioner must show that a public official "en-

gag[ed] in conduct that 'shocks the conscience' . . . or interfered with rights 'implicit in the concept of ordered liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987), *quoting Rochin v. California*, 342 U.S. 165, 172 (1952) and *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1952).

Disregarding these limiting principles, Petitioner insists that substantive due process is violated every time a prosecution occurs without probable cause, regardless of the level of culpability attributable to the officer (Petitioner's Brief, pp. 21-22). Simply permitting liability for a prosecution which occurs without probable cause, however, is tantamount to permitting liability for mere negligence. Indeed, "a want of probable cause . . . involves unreasonable conduct under the circumstances and in that respect bears some resemblance to the idea of negligence." *Prosser on Torts*, § 119 at 876. Probable cause constitutes an inquiry into whether "the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." *Carroll v. United States*, 267 U.S. 132, 161 (1925). While that standard may suffice under a fourth amendment analysis, it is insufficient to trigger principles of substantive due process.

Petitioner suggests that police officers will not be liable for mere negligence under his proposed standard because the doctrine of qualified immunity limits an officer's liability to objectively unreasonable failures to discover probable cause (Petitioner's Brief, pp. 36-37). This ostensible concession misses the mark for two reasons. First, a determination of probable cause is itself based upon the objective reasonableness of the officer's perceptions. *Prosser*, at § 119, p. 876. Objective unreasonableness is thus virtually equated with an absence of probable cause, and both sound in negligence.

Second, qualified immunity is an affirmative defense based on common law practices and, to a lesser extent, public policy concerns, but it is not constitutionally grounded. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The officer's qualified immunity is, therefore, irrelevant to the validity of the fundamental liberty Petitioner advocates. Petitioner's proposed right to be free from being charged without probable cause must, therefore, survive or fall of its own merits. A public official's qualified immunity cannot be relied upon by Petitioner as a means of watering down the explosive impact his proposed standard would have on liability.

Acceptance of Petitioner's theory would have the perverse effect of expanding the scope of liability for the unfounded filing of charges far beyond that which is currently contemplated at the common law and under federal cases which recognize a § 1983 claim for the malicious filing of charges without probable cause.[7] The common law

[7] The courts of appeals are divided on the issue whether a malicious prosecution gives rises to a § 1983 claim. *See Brummett v. Campbell*, 946 F.2d 1178, 1180-81 n. 2 (5th Cir. 1991) (cataloging cases), *cert. denied*, 112 S.Ct 2323 (1992). Some courts permit § 1983 challenges to the initiation of charges only when an independent constitutional guarantee, such as the right to equal protection is impinged. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987) (intent to discriminate); *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990); *Easton v. Sundram*, 947 F.2d 1011, 1017-18 (2d Cir. 1991) (no § 1983 claim where plaintiff not physically abused, detained or discriminated against), *cert. denied*, 112 S.Ct. 1943 (1992); *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 410 (1st Cir. 1990). Even those courts which recognize a § 1983 claim for prosecution without probable cause insist upon a showing of malice or its equivalent. *See Goodwin v. Metts*, 885 F.2d 157, 160 n. 1 and 163 (4th Cir. 1989) (failure to disclose exculpatory evidence), *cert. denied, sub nom Maxwell v. Goodwin*, 494 U.S 1081 (1990); *Strength v. Hubert*, 884 F.2d 421, 425-26 (11th Cir. 1988) (capricious prosecution procured by false and misleading evidence); *Wheeler v. Cosden Oil Chemical Co.*, 734 F.2d 254, 260 (5th Cir. 1984) (malicious tendering of false information) *Rose v. Bartle*, 871 F.2d 331, 348-49 (3d Cir. 1989) (malice or other improper purpose).

tort of malicious prosecution is triggered only when malice motivates the filing of charges without probable cause. RESTATEMENT (SECOND) OF TORTS, § 653(a) (proceedings initiated "primarily for a purpose other than that of bringing an offender to justice"). Petitioner's proposed standard, however, would entirely dispense with any requirement of malice or improper purpose, and would permit federal § 1983 claims to be stated in all criminal proceedings which do not result in a conviction.[8] As the amici National League of Cities, et al., points out, approximately one-quarter of all criminal prosecutions in the United States result in either dismissal, acquittal or *nolle prosequi* (Amici Brief, p. 12 & n. 2). If Petitioner's standard is accepted, all such individuals (over 150,000 based on 1988 figures) would be able to ride the shuttle from the state court upon dismissal of their criminal charges to the federal courthouse to sue police officers for mere negligence in failing to ascertain the absence of probable cause. Certainly principles of substantive due process do not warrant an expansion of liability beyond that already existing at common law in order to encompass merely negligent conduct.

E. Assuming Probable Cause is a Constitutional Prerequisite to the Filing of a Criminal Charge, Petitioner Has Not Identified An Egregious Abuse of Power Sufficient to Implicate Substantive Due Process

Petitioner's proposal of a standard of objective unreasonableness was unavoidable from his perspective. Officer

[8] Even a finding of probable cause in the criminal proceeding would not likely be entitled to preclusive effect in a subsequent civil case because an acquitted defendant has no opportunity for review of the finding of probable cause in the criminal case. *See, e.g., People v. Mordican*, 64 Ill.2d 257, 356 N.E.2d 71 (1976); *Stevenson v. City of Chicago*, 638 F.Supp. 136 (N.D.Ill. 1986).

Oliver's alleged pursuit of a criminal charge against Petitioner without discerning Veda Moore's unreliability cannot realistically be characterized in more culpable terms. To establish a violation of substantive due process in an individual liberties case, however, a pleader must establish an "affirmative abuse of power" through facts supportive of an inference of egregious misconduct or of conduct that "shocks the conscience." *See Rochin v. California*, 342 U.S. 165 (1952); *Daniels v. Williams*, 474 U.S. 327, 330 (1986). Such a standard might be satisfied through factual allegations of intentional misconduct, or perhaps even recklessness, when that term is utilized as a proxy for intent. *See Archie v. City of Racine*, 847 F.2d 1211, 1219-20 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065 (1989). Absent deliberate or intentional misconduct, however, the limited protections of substantive due process are simply not implicated. *See Daniels v. Williams*, 474 U.S. at 331; *Davidson v. Cannon*, 474 U.S. 344, 348 (1986).

Notwithstanding Petitioner's conclusory characterization of Officer Oliver's conduct as reckless, the facts alleged only support an inference of negligence. Petitioner does not claim that Officer Oliver singled him out for his membership in a particular class, or in retaliation for Petitioner's exercise of constitutionally protected rights, or out of malice or for any other improper purpose. Essentially, Petitioner simply alleges that Officer Oliver failed to discover that Ms. Moore was providing bad information.

Petitioner suggests that Moore's unreliability was obvious because (1) she was a drug addict who had just been released from a cocaine treatment center; (2) the substance she turned over to Officer Oliver turned out to be baking powder; and, (3) the person Moore initially identified—John Albright, Jr.—did not fit the bill of a drug dealer (*See* Petitioner's Brief, pp. 3-7).

The facts alleged by Petitioner to show Moore's obvious unreliability are subject to widely varying inferences. Initially, Moore's status as a drug addict is insufficient to indicate that she lacked credibility. The very nature of ferreting out crime necessitates the use of informants who are usually part of the criminal world themselves, or at least have earned the confidence of criminals. *See* W. LaFayve, *Search and Seizure, A Treatise on the Fourth Amendment*, Vol. I, § 3.3, p. 611 (1987). The typical narcotics informant has been described as "a guy who made a purchase a half hour ago," got caught and traded information for a deal. Rebel, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 Yale L.J. 703, 712-13 (1972).

Similarly, the fact that the substance turned in by Moore turned out to be baking powder, and that John Albright, Jr., did not resemble a drug dealer, do not raise the level of Oliver's culpability beyond mere negligence. That information might have led some police officers to conclude that the informant was leading them down a primrose path. It would be just as reasonable, however, for another officer to conclude that it was the informant who was being duped by an unscrupulous drug dealer with respect to the nature of the substance she purchased. Indeed, the frequency with which such activity occurs explains why Illinois criminalized the sale of a "look-alike substance." *See* Ill.Rev.Stat. ch. 56½, para. 1404(b) (1987). Moreover, the discrepancy in the alleged seller's identity could just as easily have been attributable to a misunderstanding as to an indication of Moore's lack of credibility.

Petitioner also contends that Officer Oliver acted recklessly because he failed to corroborate Moore's information through surveillance, marked bills or eavesdropping devices (App. 46a-47a, para. 27; Petitioner's Brief, p. 7). Once again, Oliver's

failure to utilize the corroborative techniques suggested by Petitioner can only be described as negligent. Indeed, under the circumstances, his decision appears reasonable.

Marked money, for instance, is typically effective only in a "buy-bust" transaction, where the culprit is apprehended in possession of the marked bills on the heels of the transaction. The ploy is of no use, however, in a wide-ranging grand jury investigation in which dozens of suspects are implicated by the work of a single informant or group of informants. In such cases, the investigation's secrecy is dependent upon delaying the arrests until the entire investigation is complete, rather than at the time of each individual transaction. Clearly, marked money was not a viable option.

Similarly, surveillance was not an option because the transaction allegedly occurred inside a hotel room. Elaborate video surveillance, such as that which occurs in high level F.B.I. operations is not generally feasible in small town investigations lacking the resources to utilize such measures.

Eavesdropping devices run a serious risk of detection, and consequent danger to the informant wearing such a device. A law enforcement official's refusal to use such devices is well within his discretion, and can hardly be characterized in any more culpable terms than negligence given the substantial risk involved.

The bottom line is that a case describing a flawed investigation can be made out in most criminal prosecutions which do not end in conviction. Informants can always be described as unreliable. But unless the federal courts are to sit in judgment of the adequacy of all police investigations, § 1983 challenges to the filing of charges must be limited (assuming they are cognizable at all in the absence

of detention or discrimination) to those instances where a criminal prosecution is instituted out of malice or at least with some form of actual knowledge of the defendant's innocence of the charged offense.

Indeed, the widely varying inferences which can be drawn in a credibility dispute counsel against a constitutional standard requiring such determinations in connection with the mere filing of a charge. It is one thing to require the state to make a preliminary assessment of credibility as a prerequisite to an arrest or detention. The individual's fundamental interest in avoiding an unreasonable invasion of privacy justifies burdening the government with the obligation to make a preliminary credibility determination before it conducts searches or seizures. *See Illinois v. Gates*, 462 U.S. 213 (1983).

Such a requirement, however, has never been imposed in connection with the mere filing of a criminal charge. Though Petitioner contends that the fifth amendment's grand jury clause obligates the government to weigh credibility in connection with the filing of a criminal charge (Petitioner's Brief, pp. 22-26), not even the grand jury is duty-bound to make credibility determinations in order to ensure that individuals are charged only upon reliable evidence. As the Amici National League of Cities, et al., points out, the grand jury has never been "hampered by rigid procedural or evidential rules, but instead, '[w]as free to make [its] presentments or indictments on such information as [it] deem[ed] satisfactory' " (Amici Brief, p. 19, *citing Costello v. United States*, 350 U.S. 359, 362 (1956)). Grand jury proceedings are non-adversarial in nature, and the defendant has no right to present evidence, to confront witnesses or even to appear. Alexander and Portman, *Grand Jury Indictment versus Prosecution by Information—An Equal Protection-Due Process Issue*, 25 Hast.L.J. 997, 1005-06 (1974).

Moreover, facially valid indictments returned by a duly constituted grand jury are not subject to dismissal even if exculpatory evidence is withheld from the grand jury. *United States v. Williams*, 112 S.Ct. 1735 (1992). Exculpatory evidence may be withheld because the grand jury need only assess the state's case, and credibility determinations and the like are left for the crucible of the trial process and cross examination. *See Williams*, 112 S.Ct. at 1745-46. *See also United States v. Calandra*, 414 U.S. 338 (1974) (exclusionary rule inapplicable to grand jury).

Viewed against that backdrop, the wide latitude traditionally afforded the grand jury is inconsistent with Petitioner's efforts to saddle the government with a constitutional obligation to make objectively reasonable credibility determinations before it can charge a crime based on an informant's information. Rather, limiting the government's obligation to assess credibility to the trial process and to situations where it conducts searches and seizures is thus consistent with the fourth, fifth and sixth amendments, and with this Court's interpretations of due process. Accordingly, Officer Oliver's alleged inability to discern Moore's unreliability is not the type of egregious misconduct which is required of a valid substantive due process claim.

II.

POLICE OFFICERS SHOULD NOT BE HELD RESPONSIBLE FOR A PROSECUTOR'S INDEPENDENT ACT OF FILING A CRIMINAL INFORMATION ABSENT A CLAIM THAT THE OFFICER CORRUPTED THE PROSECUTOR'S DECISIONMAKING PROCESS

Under Illinois law, the state's attorney for a particular county "is vested with exclusive discretion in the initiation and management of a criminal prosecution. *People*

ex rel. Daley v. Moran, 94 Ill.2d 41, 445 N.E.2d 270, 272 (1983). *See also* Ill.Rev.Stat. ch. 14, para. 5; ch. 38, para. 111-3(b) (state's attorney must sign the information). The decision to bring formal criminal charges against an accused is a uniquely prosecutorial act which lies at the core of the prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Nonetheless, Petitioner does not sue the prosecutor who filed the charge against him,[9] but rather, he sues the police officer who arrested him. While Petitioner's complaint sets forth a plausible false arrest claim against Officer Oliver, that claim was barred by the statute of limitations (*see* App. 4a). Having lost his false arrest claim against Officer Oliver to the statute of limitations, and his malicious prosecution claim against the prosecutor to the doctrine of absolute immunity, Petitioner seeks to hold Officer Oliver liable for the prosecutor's act of filing the felony charge. This Court should not countenance such a claim, absent allegations that the officer intentionally or fraudulently corrupted the prosecutor's decisionmaking process.

This Court's decisions on prosecutorial immunity are intended to insulate the charging decision from the threat of civil liability. *See, e.g., Burns v. Reed*, 111 S.Ct. 1934, 1938-39 (1991). Those decisions are not intended, however, to expand the liability of the police by saddling them with civil rights exposure which would, absent immunity, be borne by the prosecutors. Recognition of a general rule of police liability for causing criminal charges to be filed would undermine the operation of the criminal justice process. If generally faced with civil responsibility for the prosecutor's filing of charges, police officers will be hard-pressed to leave

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[9] This was a wise decision given the doctrine of prosecutorial immunity. *See Imbler v. Pachtman*, 424 U.S. 409 (1976).

the charging decision to the discretion of the official to whom that task is statutorily deferred. As a result, police officers will be encouraged to pressure prosecutors to charge only those cases in which a conviction is virtually assured, thus undercutting the very purpose of prosecutorial immunity.

In addition, those police officers who doubt their ability to influence the prosecutor in his charging decision will be encouraged to withhold presentation of all but the most compelling cases in the first instance. This not only interferes with the charging decision, but, even more importantly, it would reallocate the charging decision in a large number of cases to the police officer's discretion. Granted, police officers are vested with an initial level of discretion in determining which cases should be presented to the prosecutor; nonetheless, if faced with liability for the prosecutor's act of filing criminal charges, that discretion will more likely be exercised in favor of non-presentment because of the threat of civil liability rather than based on the insufficiency of the evidence.

In recognition of this division of responsibility, the federal courts of appeals have uniformly held that police officers should not be held liable for a prosecutor's decision to prosecute unless the plaintiff alleges that the officer tainted the prosecutor's decisionmaking process through submitting false information or withholding relevant evidence.[10] This rebuttable presumption in favor of police

[10] *See, Robinson v. Maruffi*, 895 F.2d 649, 655-56 (10th Cir. 1990); *Barts v. Joyner*, 865 F.2d 1187, 1195-97 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989); *Jones v. City of Chicago*, 865 F.2d 985, 993-94 (7th Cir. 1988); *Smiddy v. Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). *But see Smith v. Gonzalez*, 670 F.2d 522 (5th Cir.) (indictment is absolute bar to claim against police officer), *cert. denied*, 459 U.S. 1005 (1982).

officers is consistent with common law tort principles which are incorporated into § 1983 analysis. *See Monroe v. Pape*, 356 U.S. 167 (1961).

Viewed against that backdrop, Petitioner has not alleged facts sufficient to hold Officer Oliver liable for the state's attorney's decision to charge Petitioner with sale of a look-alike substance. Petitioner makes no allegation that Officer Oliver withheld information from the prosecutor, fabricated evidence, or engaged in any other conduct which prevented the prosecutor from making a fully informed decision to go forward. So long as the prosecutor possessed all of the relevant information bearing on the decision to file charges (and there is no allegation that he did not), Officer Oliver should not be held civilly responsible for the prosecutor's decision to prosecute.

Petitioner also implies that Officer Oliver disrupted the criminal process by withholding relevant information from the court during the preliminary hearing on probable cause two and one-half months after Petitioner was charged (*see* Petitioner's Brief, p. 7). Once again, however, Petitioner has not alleged that Officer Oliver withheld relevant information from the prosecutor. If the prosecutor sought to elicit information from Oliver with respect to the initial involvement of John Albright, Jr., and John David Albright, he could have asked Oliver questions along those lines. Absent an allegation that Officer Oliver either testified falsely or failed to apprise the prosecutor of relevant information, he should not be held responsible for the prosecutor's failure to delve into certain areas deemed relevant by Petitioner.[11]

[11] Alternatively, the doctrine of absolute immunity protects police officers and other witnesses from liability for allegedly giving per-

(Footnote continued on following page)

III.

ASSUMING PLAINTIFF HAS ADEQUATELY PLED A SUBSTANTIVE DUE PROCESS CLAIM, SUCH CLAIM IS TIME-BARRED UNDER THE STATUTE OF LIMITATION

The statute of limitations for civil rights claims asserted in federal courts situated in the State of Illinois is two years. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Anton v. Lephamer*, 787 F.2d 1141 (7th Cir. 1986). Because Petitioner's federal lawsuit was not filed until June 26, 1990, all claims arising from his arrest in October, 1987, were time-barred (*See* App. 4a). The criminal charge, however, was not dismissed until June 27, 1988. The district court concluded, therefore, that the statute of limitations did not bar Petitioner's § 1983 civil rights claim for malicious prosecution because such claims "accru[e] when the prosecution terminates in favor of the defendant" (App. 17a).[12]

Petitioner's substantive due process claim should have accrued when the charge was placed against him in October, 1987, rather than when it was dismissed in late June, 1988. The accrual date for federal causes of action is determined by reference to federal law. *See 2 Moore's Federal Practice*, § 2.08(2) n. 25. A federal civil rights claim accrues on the date the plaintiff first has reason to know of the injury which

[11] *continued*
jured testimony at a criminal trial or at a probable cause hearing. *Burns v. Reed*, 111 S.Ct. 1934, 1940-42 (1991); *Briscoe v. LaHue*, 460 U.S. 325 (1982). In this case, Officer Oliver is not even alleged to have testified falsely, but rather, he is simply accused of failing to advise the court that he initially believed that John Albright, Jr., rather than Kevin Albright, was the culprit. Any civil claims challenging that omission are, therefore, well within the umbrella of absolute immunity.

[12] The court of appeals found it unnecessary to address the statute of limitations issue (App. 12a)

was caused by a constitutional deprivation. *See e.g., Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). In this case petitioner actually concedes that "[t]he constitutional violation and the constitutional tort [are] complete upon the formal filing of the criminal charge without probable cause (Petitioner's Brief, p. 34). *See also Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

The district court's reliance on the date the charge was dismissed in June, 1988, was premised on the fact that common law claims for malicious prosecution accrue when the prosecution terminates. *See also Rose v. Bartle*, 871 F.2d 331, 348-49 (3d Cir. 1989); *Robinson v. Maruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990). Respondents dispute the validity of this approach in the context of a constitutionally based claim. While the circumstances surrounding the initiation of criminal charges may, under some circumstances, cause a deprivation of liberty without due process, this should not lead to the federalizing of the common law tort of malicious prosecution. As one commentator has suggested, "tort-laden terminology . . . only serves to obscure meaningful constitutional analysis." S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of § 1983*, § 3.15, p. 214. Therefore, "it is inappropriate to speak of § 1983 malicious prosecution." *Id.*

The rationale underlying Professor Nahmod's suggestion is persuasive. The mere fact that a pleader can establish a federal civil rights claim arising from a state court prosecution should not lead to the federalizing of a common law tort containing other elements which are irrelevant to the deprivation of the constitutional right. For instance, the common law's requirement of favorable termination of criminal charges as an element of a malicious prosecu-

tion claim is not essential to the success of a federal constitutional challenge to a particular prosecution. Even a convicted defendant may pursue a civil rights claim against those who caused his prosecution. *See King v. Goldsmith*, 897 F.2d 885 (7th Cir. 1990); *Smith v. Springer*, 859 F.2d 31, 33-35 (7th Cir. 1988). If favorable termination is not an essential element of a civil rights challenge to the decision to prosecute, then it makes little sense to set the accrual date for such claims on the day the prosecution is terminated.

Common law malicious prosection claims and civil rights challenges to certain aspects of criminal prosecutions are mutually exclusive concepts which need not be interwoven or superimposed upon each other for any purpose, including the statute of limitations. If the filing of the charge against Petitioner in October, 1987, deprived him of a liberty interest without due process, his cause of action accrued at that time, rather than eight months later when the charge was dismissed. The statute of limitations thus provides an alternative basis for affirming the decision of the court of appeals.

IV.

OFFICER OLIVER IS ENTITLED TO QUALIFIED IMMUNITY FROM DAMAGES LIABILITY[13]

Pursuant to principles of qualified immunity, public officials may not be subjected to suit under the Civil Rights Act unless "their conduct violat[ed] clearly established statutory or constitutional rights of which a reasonable person would

[13] The district court agreed that qualified immunity provided an alternative basis for the dismissal of Petitioner's § 1983 claim (App. 24a). The court of appeals found it unnecessary to address the question (App. 12a).

have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This test necessitates a fact-specific, particularized focus to resolving immunity claims. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 112 S.Ct. 534 (1991).

Even if this Court should conclude that Petitioner has sufficiently pled a substantive due process claim in connection with his prosecution for sale of a controlled substance, the uncertainty of the constitutional framework for such claims, as evidenced by the preceding discussion, prevents any such right from being deemed clearly established. Indeed, Justice White has specifically noted that there is "clear disagreement among the Courts of Appeals" on whether malicious prosecution gives rise to a cause of action under § 1983. *Campbell v. Brummett*, 112 S.Ct. 2323 (1992) (White, J., dissenting from denial of writ of certiorari). Similarly, the lower court observed that this is a question on which there is an embarrassing diversity of judicial opinion (App 5a). *See also Kompare v. Stein*, 801 F.2d 883, 891 n. 9 (7th Cir. 1986) ("whether or not the right to be free from prosecution without probable cause exists, it does not appear to be clearly established"); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) (open and difficult question whether a criminal defendant who is free on bond during the pendency of criminal charges may pursue a constitutionally based malicious prosecution claim on the basis of a deprivation of liberty). Accordingly, the law has not yet recognized a clearly established constitutional right to be prosecuted only upon an objectively reasonable belief in the presence of probable cause. Qualified immunity thus provides an alternative basis for affirming the court of appeals' decision in favor of Officer Oliver.

V.

PETITIONER'S FAILURE TO SUFFICIENTLY ALLEGE A MUNICIPAL CUSTOM, PRACTICE OR POLICY PROVIDES AN ALTERNATIVE BASIS FOR AFFIRMING THE DISMISSAL OF HIS CLAIMS AGAINST THE CITY OF MACOMB[14]

In order to state a civil rights claim against either a municipality or a public official in his official capacity, a pleader must show that his injury was caused by a municipal custom, practice or policy. *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658 (1978); *Kentucky v. Graham*, 473 U.S. 159 (1985). Because police misconduct claims generally involve actions undertaken by lower level, non-policymaking public employees, allegations based upon a single incident of such misconduct are generally insufficient to give rise to a municipal custom or policy. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). *Cf. Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (single incident may suffice where conduct undertaken by policymaker).

In this case, Petitioner's policy allegations against the City of Macomb stem from its alleged delegation of responsibility for enforcing the narcotics laws to the detective division of its police department (App. 36a, para. 3). Petitioner also targets the City's decision to provide Oliver with funds to use for the purchase of controlled substances (App. 37a, para. 8).

It stretches the imagination to claim that the provision of funding was an improper policy which caused Petitioner's injuries. Petitioner was allegedly prosecuted because of Officer Oliver's failure to discover Veda Moore's unreliability as an informant, a theory which bears no relation to the City's decision to fund the undercover drug operation. The mere fact that a municipality funds a police operation should not render it liable for every alleged flaw in the operation itself. If Petitioner's funding theory were accepted, every police shooting would support a *Monell* claim through an allegation that the City provided funding for purchase of the weapon, regardless of whether the officer was properly trained to use the weapon. Such a result would run counter to *Monell*'s admonition against *respondeat superior* liability. *See Monell*, 436 U.S. at 691.

The Mayor's alleged delegation of the narcotics investigation to Officer Oliver is similarly deficient. Municipalities always delegate control of police operations to the police department. Petitioner has not alleged that the City authorized Officer Oliver to employ unreliable, paid informants, but rather, he has claimed only that the City delegated to Oliver the leeway to conduct a police operation in the manner Oliver felt proper. If Petitioner is correct in his contention that Oliver utilized an unreliable informant, that transgression is in no sense attributable to the City, which is not alleged to have had any responsibility for Moore's employment. *See* M. Schwartz & J. Kirklin, § *1983 Litigation: Claims, Defenses and Fees*, § 3.10, p. 169 (2nd Ed. 1991) ("highly unlikely" that malicious prosecution could support claim for municipal liability).

In essence, Petitioner brought suit based upon a single act of police misconduct and tacked on conclusory allegations of a custom, practice or policy in an attempt to hold the City of Macomb responsible. Although Petitioner need not satisfy a heightened pleading requirement (*Leatherman v. Tarrant County Narcotics Intelligence and Coor-*

[14] The district court agreed that Petitioner's official policy claim was insufficient to survive the pleadings (App. 25a). The court of appeals found it unnecessary to address the issue (App. 12a).

dination Unit, 113 S.Ct. 1160 (1993)), he still must allege specific facts to support his claim of municipal liability. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Accordingly, Petitioner's failure to adequately allege a custom, practice or policy which contributed to his injury provides an alternative basis for affirming the court of appeals' decision in favor of the City of Macomb.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
FILED
AUG 6 1993
OFFICE OF THE CLERK

No. 92-833

In The

Supreme Court of the United States

October Term, 1993

KEVIN ALBRIGHT,

Petitioner,

v.

ROGER OLIVER, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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I.

THE INITIATION AND PURSUIT OF A CRIMINAL PROSECUTION BY A LAW ENFORCEMENT OFFICER WITHOUT PROBABLE CAUSE CONSTITUTE ARBITRARY GOVERNMENTAL CONDUCT WHICH VIOLATES THE DUE PROCESS CLAUSE.

Respondents recognize that our Nation has a tradition of conditioning a criminal prosecution upon probable cause. Brief of Respondents at 18; see also, Brief of the National League of Cities at 8. Respondents further recognize that a requirement of probable cause for a criminal prosecution "fairly balances the state's interests in fighting crime with the individual's interest in remaining free from the unjust accusation of a crime," Brief of Respondents at 19, and that such a requirement would impose no burden on the criminal justice process. Brief of Respondents at 19, n.6. Nevertheless, Respondents take the position that the Constitution would permit a law enforcement officer to file a criminal prosecution without such probable cause. Brief of Respondents at 11.

A.

THE PROBABLE CAUSE STANDARD FOR THE SUBSTANTIVE DUE PROCESS RIGHT.

One argument that Respondents advance for this position is that some officers who file criminal charges without probable cause maybe acting negligently and that merely negligent governmental conduct does not violate the Due Process Clause. Brief of Respondents at 22-25. This argument confuses the constitutional standard for conduct by a law enforcement officer with the standard for a judicial remedy for its violation. It aspires to

plausibility only because of the semantic circumstances that the probable cause standard, like the negligence standard, is often explained as a standard of reasonableness. *E.g., Brinegar v. United States*, 338 U.S. 160, 175 (1949). In the context of the probable cause standard, "reasonableness" implies a standard of "common sense," *Illinois v. Gates*, 462 U.S. 213, 230 (1983), but not with the same meaning as the reasonable person standard in negligence law. See *Anderson v. Creighton*, 483 U.S. 635, 643 (1987). The probable cause standard is a legal standard, that is, a constitutional standard. "The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable." *Id.* at 643-644; see *Brinegar v. United States, Supra*, 338 U.S. at 175-176.

An officer who makes an arrest or search without probable cause has violated the constitutional standard whether the officer acts deliberately and maliciously or negligently.[1] Similarly, a prosecutor may violate the due

[1] For a variety of policy reasons, the standard for a remedy for a constitutional violation may differ in various ways from that for the violation itself. See Argument II. Nevertheless, the general rule is that the exclusionary rule applies even to good faith violations of the Fourth Amendment. "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987); see also *United States v. Leon*, 468 U.S. 897, 923-924 (1984); *Franks v. Delaware*, 438 U.S. 154, 165, 171 (1975) ("deliberately or reckless"). Of course, the Fourth Amendment standard itself requires no greater certainty than probable cause. See *Maryland v. Garrison*, 480 U.S. 79, 86-87 (1987); *Hill v. California*, 401 U.S. 797, 1110-1111 (1971).

The exception to that general rule is for good faith reliance on a search warrant or a statute. *Illinois v. Krull, supra; United States v. Leon, supra*. the good faith standard is a standard of objective reasonableness; "the standard does not turn on the subjective good faith of individual officers." *Illinois v. Krull, supra* at 355.

If the Court were ever to apply the good faith exception more broadly to the exclusionary rule for warrantless searches and seizures, it would have no impact on the issue in this case. The objective reasonableness standard already governs the damages remedy for violation of the substantive due process right in this case by operation of qualified immunity. See *United States v. Leon, supra*, 468 U.S. at 922 and n.23 (analogizing the objective reasonableness standard of *Leon* and *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819 (1982). Moreover, the exclusionary rule applied in Fourth Amendment situations has no application to the requirement of probable cause for a prosecution.

process duty to disclose material exculpatory evidence even if the prosecutor merely overlooked the evidence or its significance. *United States v. Agurs*, 427 U.S. 97 (1976). The same should be true for the probable cause standard for a prosecution.

In its essence, Respondents' argument is that because some officers who act without probable cause do so negligently rather than deliberately, there should be no constitutional violation in either event. Respondents rely on *Daniels v. Williams*, 474 U.S. 327 (1986). In *Daniels*, however, the alleged violation was not of the probable cause standard or any other legal standard with a definition independent of the state of mind of the official. Rather, *Daniels* involved a claim by a jail inmate for injuries he

suffered in a fall caused by a pillow allegedly left by a correctional officer on the jail stairs. In that context, the Court held that injury caused by no more than a lack of due care "would trivialize the centuries-old principle of due process of law." *Id.* at 332.

But, due process often establishes a traditional constitutional standard for the conduct of a law enforcement officer. In this case, that standard is probable cause. An officer violates that standard without any inquiry into the officer's mental state beyond the standard itself. See *United States v. Leon, supra,* 468 U.S. at 922 n.23; *Wilson v. Seiter,* 111 S. Ct. 2321, 2326 (1991); *Graham v. Connor,* 490 U.S. 386, 399 (1989).

Moreover, Respondents ask more of their argument than it could support even if it had some validity. Respondents use it to try to deny citizens protection against deliberate as well as negligent violations. Respondents argue that there should be no constitutional right to freedom from prosecution without probable cause at all. However, that some violations of such a right may be less egregious than others is no reason to deny the right altogether.

B.

THE RECORD IN THIS CASE ESTABLISHES A VIOLATION OF THE CONSTITUTIONAL RIGHT TO FREEDOM FROM PROSECUTION EXCEPT UPON PROBABLE CAUSE.

Respondents contend that Petitioner's complaint "simply alleges that Detective Oliver failed to discover that Ms. Moore was providing bad information." Brief of

Respondents at 26. Respondents urge that police officers need to rely on drug addict informers such as Moore, despite the circumstances known to Detective Oliver showing the "obvious unreliability," Brief of Respondents at 7, of Moore as an informer. On the contrary, the complaint alleges an egregious violation of the substantive due process requirement of probable cause for a criminal prosecution.

What was Detective Oliver's basis for believing that Petitioner sold Moore the baking powder, if indeed anybody did? Respondents suggest that Moore was the source of this information and Detective Oliver should not be faulted for his mere negligence in relying on it. On the contrary, it was Detective Oliver himself, not Moore, who identified Petitioner as the alleged seller. Pet. App. 43a. What basis did Detective Oliver have for that accusation? None.

Moore identified Petitioner's father as the seller. Detective Oliver determined that was not credible. He then accused Petitioner's brother, unilaterally altering the arrest warrant. Detective Oliver determined, however, that Petitioner's brother could not have been the seller either. Without any basis Detective Oliver guessed on his own that Petitioner must be the seller. He telephoned Moore in another state and suggested Petitioner's name to her. Moore apparently agreed long distance without any way to identify Petitioner other than by his name. What basis did Detective Oliver understand that Moore had for accepting his suggestion that Petitioner might be the seller? None.

Yet Detective Oliver proceeded to present the case to the prosecutor and to the preliminary hearing exactly as Respondents have argued it: that a police officer received a tip from a reliable informer and that he relied on it. He did not report that he had actually surmised on his own that Petitioner was the culprit and that the informer had only confirmed his conjecture without any apparent basis. He did not advise that he pursued his own conjecture despite petitioner's cooperation and credible denial of involvement. No citizen could feel secure living in this society if the Constitution permitted a police officer to proffer and pursue a criminal charge in such an arbitrary, haphazard and, therefore, oppressive fashion abusive of the governmental power to invoke the severe machinery of the criminal justice process.

II.

SECTION 1983 PROVIDES A REMEDY AGAINST A LAW ENFORCEMENT OFFICER WHO INITIATES AND PURSUES A CRIMINAL PROSECUTION WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN PROBABLE CAUSE.

A.

THE LIABILITY OF DETECTIVE OLIVER FOR INITIATING AND PURSUING THE PROSECUTION WITHOUT PROBABLE CAUSE.

Respondents concede that a law enforcement officer should be subject to liability under § 1983 if the officer initiates a criminal prosecution by submitting false information to a prosecutor or failing to apprise a prosecutor of relevant information. Brief of Respondents at 32-33.

They appear to argue that the officer should not be liable if the officer merely presents all of the relevant information to a prosecutor and the prosecutor makes the judgment whether that information warrants prosecution.

Petitioner agrees both that the officer should be liable only for his or her own conduct with regard to the prosecution and should enjoy only qualified immunity and not the extraordinary immunity of the prosecutor in the charging process. See *Buckley v. Fitzsimmons*, ___ U.S. ___ (1993). In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court held that an officer is not shielded from a damages action by applying to a judicial officer for a warrant if the officer failed to exercise reasonable professional judgment. Similarly, an officer should not be shielded from an action if, in submitting evidence to a prosecutor for the filing of an information, he failed to exercise reasonable professional judgment in the presentation or withholding of evidence. See *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (The officer should not benefit from the immunity of the prosecutors "whom they have defrauded"); cf. Restatement (Second) Torts § 653, Comment g (ALI, 1977).

Respondents err, however, in arguing that the complaint did not meet that standard. The complaint alleged that Detective Oliver attested to a criminal information charging that petitioner distributed a "look alike" substance to Moore, knowing that he did not have probable cause for that charge. Pet. App. 43a. The complaint further alleged that Detective Oliver had received no information identifying Petitioner as the person who

committed the offense. Pet. App. 43a. It alleged that without any basis he surmised that Petitioner had done it and obtained an informer's concurrence without any indication that she had any basis for such agreement. Pet. App. 43a.

Nothing in the record suggests that the prosecutor played any greater role than relying on Detective Oliver's representations and judgment. Under Illinois law, a law enforcement officer may swear out an information, although the information must also be signed by a prosecutor. 725 Ill.Code § 5-111-3(b). Respondents suggest that the prosecutor "could have asked Oliver questions" about his earlier accusations against Petitioner's father and brother. Brief of Respondents at 33. That point misapprehends the standard. Detective Oliver "cannot excuse his own default by pointing to the greater incompetence of the" prosecutor. *Malley v. Briggs, supra,* 475 U.S. at 346 n.9.[2]

B.

THE OBJECTIVE REASONABLENESS STANDARD FOR § 1983 LIABILITY.

Respondents argue that the standard for liability should require proof of malice or improper purpose. Brief of Respondents at 25. Such a requirement would be

[2] When Petitioner voluntarily reported to Detective Oliver upon learning about the information he was briefly arrested and released on bond. Although that arrest violated the Fourth and Fourteenth Amendments because it was made without probable cause, it was the prosecution more than the arrest that caused Petitioner serious injury.

extraordinary under § 1983 and would be unnecessary as the qualified immunity standard provides law enforcement officers adequate protection unless they are unquestionably incompetent or purposefully violate the law. See Brief of Petitioner at 36-37.

Respondents argue that "(t)he common law tort of malicious prosecution is triggered only when malice motivates the filing of charges without probable cause." Brief of Respondents at 24-25. Such a malice requirement, in the typical state court malicious prosecution action, however, can generally be inferred simply from a lack of probable cause. *Denton v. Allstate Ins. Co.,* 152 Ill.App.3d 578, 504 N.E.2d 756, 762 (1986); Prosser & Keaton, THE LAW OF TORTS § 119, p. 884 (1984).[3] Accordingly, the § 1983 qualified immunity standard of objective reasonableness where an action will lie only if no reasonably trained officer could have thought probable cause existed, *Hunter v. Bryant,* 112 S.Ct. 534, 536 (1991), may be more rigorous than the malice standard for malicious prosecution. See e.g. *Wyatt v. Cole,* 994 F.2d 1113, 1120 (5th Cir. 1993) ("*Harlow's* qualified immunity standard is far more demanding than the objective components of the common law probable cause inquiry . . . ")

Respondents speculate that every criminal accused who wins a dismissal, a *nolle prosequi,* or an acquittal will "ride the shuttle" to the federal courthouse "to sue police officers." Brief of Respondents at 25. That specter is

[3] Cf, Brief of the National League of Cities at 24 n.12: "Of course, where a police officer has actual knowledge that a witness has lied to him and nevertheless proceeds to refer charges, that officer can be said to have acted with malice."

based, however, on Respondents' exaggerated characterization of the § 1983 claim as based on "mere negligence in failing to ascertain the absence of probable cause." *Id.* If reassurance is necessary, it is available from the experience of the states who have long provided malicious prosecution actions that have not stirred up such imagined hyperbolic litigiousness.

Such reassurance is also available from the experience with § 1983 actions for false arrest and illegal search. *Hunter v. Bryant, supra; Anderson v. Creighton, supra.* State officers are qualifiedly immune from suit and § 1983 plaintiffs carry the burden of showing the officer's actions were "plainly incompetent" or "knowingly violat[ive]" of constitutional rights. *Malley v. Briggs, supra,* 475 U.S. at 341; *Davis v. Scherer,* 468 U.S. 183, 190-191 (1985); *Anderson v. Creighton, supra; Hunter v. Bryant, supra,* 112 S.Ct. at 536. Moreover, the Court has ensured that those entitled to the benefit of qualified immunity have the immunity determination made at the earliest stages of any litigation. *Harlow v. Fitzgerald, supra,* 457 U.S. at 816-818; *Mitchell v. Forsyth,* 472 U.S. 511 (1985); *Hunter v. Bryant, supra,* 112 S.Ct. at 536; *Siegert v. Gilley,* 111 S.Ct. 1189, 1193 (1991). Therefore, Respondents' speculation that criminal defendants who gain dismissal of their criminal charges before trial would inundate the federal courts with § 1983 actions is unrealistic.

C.

THE REMEDY FOR VIOLATIONS OF THE CONSTITUTIONAL RIGHT TO FREEDOM FROM PROSECUTION EXCEPT UPON PROBABLE CAUSE.

Respondents argue: "Never before has the Court expanded the boundaries of substantive due process for

the sole purpose of accommodating a § 1983 damages action on behalf of an aggrieved individual." Brief of Respondents at 17. Substantive due process rights are established, however, to provide constitutional protection for them in our society. A § 1983 action is one way of enforcing such rights if officials fail to honor them. Often such an action is the only effective remedy. E.g., *Youngberg v. Romero,* 457 U.S. 307 (1982) (substantive due process protects mentally retarded persons involuntarily committed to a state institution and a § 1983 damages remedy is available to enforce the protection); Cf. *Helling v. McKinney,* ___ U.S. ___, 61 L.W. 4649, 4650 (1993); *Hudson v. McMillian* 503 U.S. 1 (1992); *Graham v. Connor,* 490 U.S. 386 (1989); *Tennessee v. Garner,* 471 U.S. 1 (1985); *Estelle v. Gamble,* 429 U.S. 97 (1976).

Respondents further argue that if the right to freedom from criminal prosecution except upon probable cause "was truly worthy of constitutional recognition, then *a fortiori,* it would be deserving of a procedural safeguard." Brief of Respondents at 21. In respect to its procedural safeguards, however, this substantive due process right is analogous to others, such as the due process duty of a prosecutor to disclose material exculpatory evidence to a defendant. *Brady v. Maryland,* 373 U.S. 83 (1963). The due process duty of disclosure is left to the prosecutor in the first instance, without judicial review before conviction. See *United States v. Bagley,* 473 U.S. 667 (1985); *United States v. Agurs,* 427 U.S. 97 (1976). The Court's decisions instruct prosecutors in their constitutional duty but the initial enforcement of the duty is the responsibility of the prosecutors themselves. Similarly, the Court, by its decisions, instructs law enforcement

officers in the probable cause standard for criminal prosecutions and leaves the initial enforcement of the standard to them, subject to judicial review only later.

Indeed, Respondents' point works against their position opposing a remedy under 42 U.S.C. § 1983 for a violation of the right. A § 1983 remedy is designed to deter as well as to remedy any constitutional violation. *Malley v. Briggs, supra,* 475 U.S. at 344. Without such a remedy, it may truly be said the constitutional command is advisory only. Dismissal or termination of the criminal prosecution mitigates the harm from the violation but does not provide a remedy for it. "A 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.' " *Gomez v. Toledo,* 446 U.S. 635, 639 (1980); see also *Anderson v. Creighton, supra,* 483 U.S. at 638; *Malley v. Briggs, supra,* 475 U.S. at 344. Policy reasons – such as avoiding delay – may counsel against constitutionally required judicial review of grand jury indictments[4] or prosecutor informations before trial. *Costello v. United States,* 350 U.S. 359, 361 (1956). But, they only make more important the availability of the § 1983 remedy.

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[4] In *United States v. Williams,* ___ U.S. ___, 112 S.Ct. 1735 (1992), the Court held that the federal courts have no supervisory judicial authority over grand juries and, therefore, no power to require prosecutors to present exculpatory evidence to the grand jury.

III.

THE ISSUES RAISED BY THE RESPONDENTS OF QUALIFIED IMMUNITY, STATUTE OF LIMITATIONS, AND MUNICIPAL CUSTOM OR POLICY WERE NOT PASSED UPON BY THE COURT OF APPEALS AND, ACCORDINGLY, MAY BE LEFT TO THE COURT OF APPEALS ON REMAND.

A.

QUALIFIED IMMUNITY

Respondents argue that Detective Oliver is entitled to the benefit of qualified immunity in this case because "the law has not yet recognized a clearly established constitutional right to be prosecuted only upon an objectively reasonable belief in the presence of probable cause." Brief of Respondents at 37. That argument overlooks the long constitutional tradition demonstrating the centrality of probable cause to the initiation of criminal process.

Qualified immunity is "assessed in light of the legal rules that were 'clearly established' at the time." *Anderson v. Creighton,* 483 U.S. 635, 637 (1987). The Court has made clear that this does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* at 640. Instead, it is only necessary "that in the light of pre-existing law the unlawfulness must be apparent." *Id.* "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*; see generally, *Norfleet v. Arkansas Dept. of Human Resources,* 989 F.2d 289, 291 (8th Cir. 1993); *Tribble v. Gardner,* 860 F.2d 321, 324, cert. den.,

490 U.S. 1075 (1988); *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988).

In a distinguished line of early and recent decisions this Court has long assumed that the requirement of probable cause for a prosecution is a part of due process. See Brief of Petitioner at 13-17. The courts of appeals have generally held or assumed that the Due Process Clause requires probable cause for a prosecution. See Brief for Petitioner at 14-15, n.7. The court below did not dispute this proposition, but based its decision only on whether a § 1983 action would lie for violation of the due process requirement.[5] Respondents are unable to cite a single authority holding or suggesting that due process does not require probable cause for a prosecution. Respondents concede that the Constitution does require probable cause for a prosecution if the accused is arrested or detained and recognize that as a practical matter that "compels the states to apply a standard of probable cause to the filing of all felony charges . . . [because] the state does not know in advance which criminal defendants will make bail, and which will not." Brief of Respondents at 19. It would be extraordinary to hold that an officer, acting within this constitutional system as conceived and by long tradition as practiced, could ever have reasonably believed probable cause was not required to support bringing a criminal

[5] Respondents appear to confuse this point when they argue that "Justice White has specifically noted that there is 'clear disagreement among the Courts of Appeals' on whether malicious prosecution gives rise to a cause of action under § 1983." Brief of Respondents at 37. The question is whether the constitutional right is well established, not whether the § 1983 action is well established. *Anderson v. Creighton, supra.*

prosecution. Respondents do not identify any source that would give Detective Oliver any basis for believing that the Constitution did not require him to have probable cause before initiating a criminal prosecution against Petitioner.

But, this Court need not reach this question. The court below did not discuss it. Accordingly, the Court may remand the case for the Court of Appeals to pass on this issue in the first instance.

B.

STATUTE OF LIMITATIONS

The courts of appeals have consistently held that one element of a claim under § 1983 for a prosecution without probable cause is that the underlying prosecution terminate in favor of the plaintiff. *Brummett v. Camble*, 946 F.2d 1178, 1183-1184 (5th Cir. 1991); *Robinson v. Maruffi*, 895 F.2d 649, 654-655 (10th Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 348-349 (3d Cir. 1989); *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980).[6] Such a rule is required by the common law for malicious prosecution actions, Restatement (Second) Torts 658 (1977), is grounded in sound policy, and may also be required by abstention

[6] Respondents cite two cases in which civil rights plaintiffs were permitted to sue under § 1983 for the presentation of false evidence to procure their convictions, *King v. Goldsmith*, 897 F.2d 885 (7th Cir. 1990) and *Smith v. Springer*, 859 F.2d 31, 33-35 (7th Cir. 1988). Those claims were not based on the substantive due process right to be free from a criminal prosecution except upon probable cause but on a different due process right.

theory under *Younger v. Harris*, 401 U.S. 37 (1971) or principles of *res judicata*.

Petitioner was not free of the harm resulting from his prosecution until it terminated in his favor. He could not have filed this action until the prosecution against him was dismissed. *Brummett v. Camble, supra*, 946 F.2d at 1183-1184.

This is another issue that the Court need not reach. The Court below did not discuss it. Accordingly, the Court may remand the case for the Court of Appeals to pass on this issue in the first instance.

C.

MUNICIPAL CUSTOM OR POLICY

This is an issue the Court need not reach. It was not within the question on which the Court granted certiorari, Rule 24.1(a), Supreme Court Rules. The court below did not discuss it. Accordingly, the Court may remand the case for the court of appeals to pass on in the first instance, see *Leatherman v. Tarrant County*, ___ U.S. ___, 61 L.W. 4205 (1993).

IV.

CONCLUSION

For the foregoing reasons and the reasons stated in Petitioner's opening brief, the judgment affirming the dismissal of the complaint for failure to state a § 1983 claim should be reversed, and the case should be remanded for further proceedings on the § 1983 claim.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEVIN ALBRIGHT,

Petitioner,

—v.—

ROGER OLIVER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ILLINOIS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of nearly 300,000 members; the ACLU of Illinois is one of its statewide affiliates. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty embodied in the Constitution. Those principles are primarily designed to structure the relationship between the individual and the state in a manner that affords proper protection for those rights and ensures against any abuse of power by state officials. Accordingly, the ACLU has consistently argued in this and other courts that 42 U.S.C. §1983 can and should be broadly interpreted to defend individual rights against the misuse of state power.

Because we believe that the decision below implicates important interests with respect to the reach and meaning of §1983, we submit this brief *amicus curiae* in the hope that it will assist the Court's resolution of this case.

STATEMENT OF THE CASE

The case involves a particularly offensive misuse of the state criminal justice machinery. At the time of the events in question, petitioner Kevin Albright was a senior at Western Illinois University in Macomb, Illinois, with no criminal record or history. In March 1987, respondent Roger Oliver was a detective working for the police department of Macomb, Illinois. In the spring of 1987, Oliver hired Veda Moore, a cocaine addict, to act as an informant for him, and agreed to pay her $100 to $150 for each drug dealer from whom she reported she had purchased narcotics. Over the next few months she

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

reported that she had purchased cocaine from more than fifty individuals.

Ms. Moore's information about these alleged purchases did not lead to a single successful prosecution. The "cocaine" that she had allegedly purchased and then turned over to police authorities turned out in many instances to be baking soda. As the court below noted, this record strongly suggests that "Moore had bought some cocaine either from she knew not whom or from someone she was afraid to snitch on . . . that she consumed it and replaced it with baking soda, and that she had then picked a name from the phone book at random" to report as a dealer, in order to cover up her consumption of the cocaine she had purchased. *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992).

One of the individuals from whom Ms. Moore allegedly purchased cocaine was named John Albright, Jr. After a laboratory test, the "cocaine" turned out to be harmless baking soda. Based upon Ms. Moore's testimony, a grand jury nevertheless indicted John Albright for sale of a "look alike" substance. When the police came to arrest Mr. Albright, they discovered that he was a retired pharmacist unlikely to have purchased any illegal substance. Detective Oliver then asked Mr. Albright whether he had any sons, assuming that perhaps his informant had confused the elder Mr. Albright with one of his sons. When he learned that Mr. Albright had two sons, one of whom was also named John, he altered the name on the arrest warrant from "John Albright, Jr." to "John David Albright."

It turned out, however, that John David Albright lived in Chicago and had an alibi for the day when the cocaine sale allegedly occurred. Instead of reexamining the veracity of his informant or making any further investigation of the situation, Detective Oliver called his informant (who by then had moved to Florida) and simply asked her whether she had confused the elder Mr.

Albright with his other son, petitioner Kevin Albright, a student at Western Illinois University. She readily agreed that Kevin was the Albright with whom she had dealt.

Detective Oliver then scratched John David Albright's name from the arrest warrant and substituted Kevin's name. When petitioner Kevin Albright heard that the police were looking for him, he turned himself in and was arrested and arraigned. He had to post bond in the amount of $3,500, which he did by paying a nonrefundable fee of 10% of that amount to the court. He was also restricted in his movements; under the terms of the bond, he could not leave the state without permission of the court. As a result, he was not able to go to St. Louis for a job interview while the charges were pending.

Eventually all the criminal charges against petitioner were dismissed.[2] Petitioner then brought this action in federal court under 42 U.S.C. §1983. His claim was rejected by the lower courts, which held as a matter of law that §1983 did not permit recovery against state officials for malicious prosecution. According to the Seventh Circuit, even if the facts would justify a state common law claim for malicious prosecution, no constitutional claim could be brought. The court reasoned:

> The medley of harms that a malicious prosecution inflicts, when as in this case, the defendant is exonerated before any punishment is imposed . . . is similar to that inflicted by defamation, which by impairing a person's reputation not only embarrasses

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[2] The informant, Veda Moore, was found to have purchased cocaine with the money given her by respondent Oliver. 957 F.2d at 345.

> and even outrages him but also undermines his ability to make favorable transactions, whether business or personal, thereby subjecting him to costs pecuniary or nonpecuniary or both.

975 F.2d at 345. The Seventh Circuit then concluded that, under this Court's ruling in *Paul v. Davis*, 424 U.S. 693 (1976), no constitutional violation occurs when only reputational damage has been inflicted.

SUMMARY OF ARGUMENT

Contrary to the view of the Seventh Circuit, this is not a case about "reputational injury," it is a case about the abuse of government authority. The complaint alleges that persons acting under color of law deliberately and maliciously abused the state's criminal process. Petitioner further alleges that he suffered clear and foreseeable consequences as a result. These allegations state a cause of action under 42 U.S.C. §1983, which was adopted by a Congress specifically concerned about judicial breakdowns on the local level.

The history, background and purpose of §1983 require recognition of a malicious prosecution constitutional tort. The abuse of power connected with the deliberate bringing of false charges against an individual was precisely the type of evil which the 42d Congress hoped to eliminate.

Furthermore, the deliberate and malicious bringing of false criminal charges by a law enforcement officer involves more than reputational damage. Such outrageous conduct is constitutionally prohibited by the substantive provisions of the Due Process Clause. In addition, the existence of pending criminal charges involves a significant loss of liberty for the person charged. This loss of liberty fits comfortably with the remedial scope of §1983.

ARGUMENT

I. THE HISTORY, BACKGROUND AND PURPOSE OF SECTION 1983 SUPPORTS THE RECOGNITION OF MALICIOUS PROSECUTION AS A CONSTITUTIONAL TORT

The history and purpose of §1983 have been examined by this Court in minute detail. *See e.g., Wilson v. Garcia*, 471 U.S. 261 (1985); *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961). Based upon that review of the legislative history, it is now commonly agreed that §1983 was adopted in response to what Congress perceived as a generalized breakdown in the administration of justice in the Southern states following the Civil War. In particular, Congress was deeply concerned by evidence showing that Southern officials had been "unable or unwilling" to stem the tide of Klan violence through vigorous enforcement of state criminal laws.

This case presents the reverse situation. Petitioner's claim is that respondent has misused the criminal process rather than ignored it. In this context, however, there is no reason to distinguish between sins of commission and sins of omission. To accept the argument that §1983 does not reach the conduct described in petitioner's complaint, it is necessary to believe that the 42d Congress would have been undisturbed by evidence that Southern officials were falsely prosecuting innocent victims of Klan violence, as well as failing to bring legitimate prosecutions against Klan members. Merely to state the proposition is sufficient to refute it.

Both the legislative debate that preceded passage of §1983, and this Court's decisions interpreting the statutory language, repeatedly refer to the right of each citizen to demand that the government execute the laws in a faithful and impartial manner. *E.g., Monell*, 436 U.S. at 670. Undoubtedly, government officials who tolerate

vigilantism have failed in that obligation. But it is equally clear that government officials who convert the power to prosecute into a power to persecute have also violated their constitutional duty. In either event, there has been what one supporter of §1983 aptly described as a "defect in the administration of the laws . . . ." Cong. Globe, 42d Cong., 1st Sess. 505 (1871)(remarks of Sen. Pratt), *quoted in Monroe*, 365 U.S. at 178.

Maladministration of the laws can have many consequences. A failure to prosecute can lead to injury or death, as it frequently did during the Klan rampages that led to enactment of §1983. A malicious prosecution can lead to false arrest, false imprisonment and emotional distress.[3] Whatever the consequences, however, the core of the constitutional complaint is the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." *United States v. Classic*, 313 U.S. 299, 326 (1941).

The duty of state officials to administer the law fairly and impartially is essential to the relationship between individuals and the government that lies at the core of the Fourteenth Amendment. The contours of that relationship were spelled out by this Court in *Monell*. Quoting again from the legislative history of §1983, this Court noted that the drafters of the Fourteenth Amendment clearly believed that it imposed an obligation on government to protect its citizens. 436 U.S. at 658. That obligation is often enforced through the criminal justice system.

A criminal justice system that persecutes the innocent through baseless prosecutions is not fundamentally

[3] The court's erroneous conclusion that there was no loss of liberty in this case because petitioner was not imprisoned or otherwise restricted in his freedom of movement is discussed in Point II below.

different than a criminal justice system that permits persecution of the innocent by private vigilantes, like the Ku Klux Klan. What the government may not do indirectly, it surely may not do directly.

II. AN ALLEGATION THAT PERSONS ACTING UNDER COLOR OF LAW MALICIOUSLY ABUSED THE CRIMINAL PROCESS STATES A CAUSE OF ACTION UNDER §1983

The decision below approached the key legal issue presented by this case -- whether malicious prosecution by a state actor violates the Constitution -- from the wrong perspective. Furthermore, it made a series of faulty deductions that eventually led it to the wrong conclusion.

At the heart of the circuit court's error was its assumption that "[m]alicious prosecution, whether civil or criminal, resembles defamation." 975 F.2d at 345. Beginning with this faulty premise, it then concluded that if "the injuries that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes." *Id.* at 346. As support for this syllogism, the Seventh Circuit cited this Court's decision in *Paul v. Davis*, 424 U.S. 693, which forecloses a constitutional claim based *solely* upon reputational injury.

Three faulty assumptions underlie the Seventh Circuit's reasoning: (1) malicious prosecution is constitutionally analogous to and resembles defamation; (2) malicious prosecution does not lead to a deprivation of liberty and, therefore, does not respond to any constitutional injury; and (3) the calculation of damages under §1983 can never consider reputational injury. As demonstrated below, all three of these conclusions are incorrect.

A. Malicious Prosecution Is More Than Defamation

It must be noted at the outset that most federal courts, except for those in the Seventh Circuit and perhaps the Eighth Circuit[4], have accepted the proposition that malicious prosecution can be the basis for a §1983 claim. While all have recognized that a state actor must be involved to invoke §1983 (unlike the common law claim which has no such requirement), the majority of these courts have acknowledged that the abuse of state power associated with a malicious prosecution claim should be cognizable under §1983. *See, e.g., Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 2323 (1992)(constitutional malicious prosecution claim follows common law rules); *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991)(state common law requirements applied to constitutional malicious prosecution claim); *Janetka v. Dube*, 892 F.2d 187 (2d Cir. 1989)(constitutional malicious prosecution claim can properly be brought where state actor instituted criminal charges against another party with malice and without probable cause, and when the proceedings terminated in plaintiff's favor); *White v. Frank*, 855 F.2d 956 (2d Cir. 1988)(same); *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1990)(constitutional malicious prosecution claim follows state common law requirements); *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990)(continuation of criminal proceedings after evidence developed to show plaintiff innocent of crime established constitutional malicious prosecution case; policeman who supplied false information liable under §1983); *Wheeler v. Cosden Oil and Chemical Co.*, 734 F.2d 254 (5th Cir. 1984)(if state prosecutor brings charges without probable cause, such malicious prosecution is violation of due process); *Losch v. Borough of Parkesburg*, 736 F.2d 903 (3d Cir. 1984)(same); *Lee v. Mihalich*, 847 F.2d 66 (3d Cir. 1988)(constitutional claim follows common law rules); *Purdie v. Tierney*, 769 F. Supp. 864 (E.D.N.Y. 1991)(constitutional malicious prosecution claim requires showing of lack of probable cause and maliciousness); *Whelehan v. County of Monroe*, 558 F.Supp. 1093 (W.D.N.Y. 1983)(malicious prosecution claim against prosecutor states valid cause of action but prosecutor may have absolute immunity); *DiMaggio v. O'Brien*, 497 F.Supp. 870 (E.D.Pa. 1980)(abuse of process and malicious prosecution can be basis for §1983 claim); *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988)(law enforcement officer violated plaintiff's constitutional rights by engaging in bad faith, malicious prosecution); *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988)(malicious prosecution claim cognizable under §1983; Fifth Amendment violation); *Sheppard v. Byrd*, 581 F.Supp. 1374 (N.D.Ga. 1984)(malicious prosecution claim involving loss of livelihood does implicate constitutional claim). *Cf. Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404 (1st Cir. 1990)(to bring a malicious prosecution action under §1983, the plaintiff must allege the elements of a common law malicious prosecution claim and must also allege that there was an egregious misuse of legal proceedings).

[4] In its recent decision in *Sanders v. Sears, Roebuck & Co, Inc.*, 984 F.2d 972, 977 (8th Cir. 1993), the Eighth Circuit held that "malicious prosecution can form the basis for a §1983 suit only if defendant's conduct also infringes some provision of the Constitution or federal law."

The Seventh Circuit's view that malicious prosecution causes nothing more than reputational injury is, at best, a theoretical construct that cannot be reconciled with the actual record complied in cases around the country. For example, in *Karim-Panahi v. L.A. Police Department*, 839 F.2d 621 (9th Cir. 1988), the authorities fabricated charges, falsified facts, destroyed evidence and strip-searched the plaintiff because of his race. In *Losch v. Borough of Parkesburg*, 736 F.2d 903, charges were maliciously filed to suppress criticism of a public offi-

cial's actions. In *Conway v. Village of Mount Kisco*, 750 F.2d 205 (1984), 758 F.2d 46 (2d Cir. 1985), *cert. dismissed sub nom. Cerbone v. Conway*, 479 U.S. 84 (1986), the plaintiff underwent seven hours of detention. In other malicious prosecution cases, the corruption of witnesses and falsification of evidence has led to the denial of a fair trial. *See generally Torres*, 893 F.2d at 410, and *Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986).

Thus, malicious prosecution almost always involves reputational injury, as the Seventh Circuit recognized. But, contrary to the view of the Seventh Circuit, it frequently involves a great deal more. Indeed, because of the coercive nature of the criminal justice system, malicious prosecution represents a paradigmatic example of the misuse of governmental power.

As this Court emphasized only last year: "The Due Process Clause . . . was intended to prevent government from 'abusing [its] power or employing it as an instrument of oppression,'" *Collins v. City of Harker Heights, Texas*, __ U.S. __, 112 S.Ct. 1061, 1069 (1992), *quoting DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989). The principle that redress is available under §1983 when such due process violations occur is central to our conception of federal rights and cannot be defeated by a misleading equation between malicious prosecution and defamation.

B. Petitioner Clearly Suffered A Loss Of Liberty As A Result Of The Malicious Prosecution In This Case

The court below concluded that there was no loss of "liberty" because there was no "punishment" inflicted on the petitioner. In doing so, it accepted an extremely crabbed view of the meaning of "liberty" under the Due Process Clause.

The term "liberty" is not coextensive with freedom

from punishment or incarceration. Rather, this Court has accepted the definition of "liberty " originally articulated in Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961):

> "[L]iberty" is not a series of isolated points picked out in terms of the taking of property .... It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints .... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

See also Planned Parenthood of Southeastern Pennsylvania v. Casey, __ U.S. __, 112 S.Ct. 2791, 2805 (1992); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977).

A malicious prosecution inevitably entails a deprivation of liberty under this standard. By definition, an arrest is an "imposition" and "restraint." An arrest that lacks any evidentiary basis whatsoever -- as petitioner has alleged on the facts of this case -- is just as obviously a "substantial arbitrary imposition[] and purposeless restraint[]." It therefore offends our core conception of constitutional liberty.

In addition, the fact that petitioner was under court process for a significant period of time while free on bond resulted in other, additional restraints on his liberty. Under Illinois law and under the law in all states, persons freed under bond are severely restricted in their freedom of movement. Specifically, under Illinois' Code of Criminal Procedure, every person released on bail must agree to the conditions of a bail bond. The mandatory provisions of every bail bond are:

> §110-10. Conditions of bail bond.
>
> (a) If a person is released prior to convic-

tion, either upon payment of bail security or on his or her own recognizance, the conditions of the bail bond shall be that he or she will:

> (1) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court;
>
> (2) Submit himself or herself to the orders and process of the court;
>
> (3) Not depart this State without leave of the court; and
>
> (4) Not violate any criminal statute of any jurisdiction.

Ill.Rev.Stat., Ch.38, §110-10 (1987).

These conditions are very significant restraints upon a person's freedom of movement and ability to live one's life, *i.e.*, his or her "liberty." The Seventh Circuit remarked that while Mr. Albright was "confined" to Illinois, it was similar to Hamlet being confined to the "dungeon" of Denmark, 975 F.2d at 346. But the court's casual statement that Mr. Albright was not "punished" because he was not imprisoned, *id.* at 345, does not take into account the restraints on his life that the bail conditions established.

Thus, Mr. Albright wished to leave the state for a job interview in St. Louis. While such freedom is a matter of course to any other person, Mr. Albright would have had to hire a lawyer to make a proper motion, pay additional fees, wait until the court acted, and he still might not have succeeded in obtaining leave to cross state lines. *See* Petition for *Certiorari* at 45a. This was not "a modest infringement of liberty," as the court below concluded, *id.* at 347, it was a direct restriction on petitioner's right of interstate travel. *Cf. Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901-03 (1986)(plurality opinion).

In other contexts, this Court has acknowledged that court orders that restrain a person's movements or freedom are significant restraints upon liberty. Thus, this Court has held that a person is in "custody" when he or she is free on detainer or bail for purposes of applying the federal habeas corpus statute, 28 U.S.C. §2254(d). *See Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Peyton v. Rowe*, 391 U.S. 54 (1968). *See also Rose v. Morris*, 619 F.2d 42 (9th Cir. 1980).

The principle established by these cases is that detainer or restraint by court order or process is a meaningful interference with personal mobility and thus constitutes a deprivation of liberty. A person is "restrained" in that he or she may not travel beyond the limits established by the bond. If the bond conditions are allegedly violated, the bond may be forfeited and the person remanded, regardless of the later disposition of the underlying criminal charges. In short, the necessity of complying with bond conditions involves a significant interference with personal liberty.[5]

C. Reputational Injury Can Be Part Of The Calculation Of Damages Under §1983

The court below confused the difference between a constitutional cause of action and the injury created by unconstitutional conduct.

This Court held in *Paul v. Davis* that an action for

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[5] Moreover, once petitioner was arrested, a criminal file was presumably created that did not previously exist. The consequences of that record cannot be fully known. However, at the very least, expungement of the record is an appropriate remedy under §1983.

common law defamation cannot be converted into a §1983 lawsuit merely because the alleged tortfeasor is a state official. *Paul* does not hold that "reputational injury" may never be considered as part of a constitutional claim. To the contrary, *Paul* approvingly cites a series of decisions in which "reputational injury" formed a significant element of plaintiff's constitutional claim. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 574-75 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951).

What distinguishes *Paul* from this line of cases is that, in *Paul*, the plaintiff alleged *only* reputational injury. His complaint, as this Court noted, failed to "assert [the] denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment." 424 U.S. at 712. Here, by contrast, petitioner has alleged significant restraints on his personal liberty flowing from his malicious prosecution claim. Under these circumstances, the *Paul* analysis, relied on so heavily by the court below, simply does not apply.

III. RELEGATING ALL MALICIOUS PROSECUTION ACTIONS AGAINST STATE ACTORS TO THE STATE COURTS WOULD UNDERMINE, NOT ENHANCE, IMPORTANT FEDERALISM VALUES

This Court has emphasized that §1983 was not designed to mirror state common law claims when the defendant happens to be a state actor. The Fourteenth Amendment does not give every person a right "to be free of injury wherever the state may be characterized as a tortfeasor." *Paul v. Davis*, 424 U.S. at 701. "Such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* Thus, it is clear that the Constitution is not violated if a

state actor driving a state-owned car on business accidentally runs over an individual. State tort law is more than sufficient to afford a remedy.

But, by the same token, when a state actor deliberately misuses significant state machinery to charge a person with a criminal offense, that is not "merely" a state tort. As one commentator has noted:

> injuries inflicted by public officers can be thought to differ significantly from injuries inflicted by private persons. Backed by state power and apparent authority, such officials threaten core societal notions of human dignity through their misconduct.

See Monaghan, "State Law Wrongs, State Law Remedies and the Fourteenth Amendment," 86 Colum.L.Rev. 979, n.88 (1986).

Accordingly, this Court has often acknowledged "the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974); *Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982). Section 1983 is perhaps the most important vehicle for the vindication of those rights in the federal system. Many constitutional claims brought under §1983 have parallel state torts. Yet, this Court has repeatedly held that "[t]he federal remedy [under §1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. at 183. *A fortiori*, the federal remedy should not be denied altogether because the same challenged conduct caused nonconstitutional injuries that might have been remedied in a state law proceeding.

In short, the decision below does not promote the interests of federalism. Instead, it simply substitutes its view of federal-state relations for the view adopted by the 42d Congress when it enacted §1983. This Court should not sustain that exercise in judicial redrafting.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

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Dated: April 26, 1993

No. 93-5830

In The
Supreme Court of the United States
October Term, 1993

Kevin Albright,
Petitioner,
v.
Roger Oliver and City of Macomb, Illinois,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a complaint alleging that a police officer has sworn out a criminal information without an objectively reasonable belief in probable cause states a violation of substantive due process in the absence of an allegation that the police officer corrupted the prosecutor's decision to initiate a prosecution.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. *Amici*'s members will be directly affected by the Court's resolution of the issues presented.

In this case, the Court is called upon to address whether, and under what circumstances, a criminal prosecution terminating in favor of the accused violates the Constitution. Petitioner's asserted right originates in the substantive component of the Due Process Clause, an "unchartered area" of "scarce and open-ended" guideposts, *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992); his proposed standard for finding that a violation has occurred would impose liability far more frequently than the common law of malicious prosecution. Because petitioner's proposed standard finds no support in the Court's substantive due process jurisprudence and would, because of its disruptive impact on the criminal process, be gravely injurious to the public interest, *amici* submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is whether, under the substantive component of the Due Process Clause, petitioner Kevin Albright can hold liable respondents, Roger Oliver, a police detective with twenty years experience, and the City of Macomb, Illinois, his employer, for "initiating and pursuing a criminal prosecution against him without probable cause or an objectively reasonable belief in probable cause." Pet. Br. 3. At the heart of petitioner's complaint are two instances of respondent Oliver's conduct: (1) his swearing out of a criminal information charging Albright with a crime "based upon the inherently unre-

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

liable statements" of Veda Moore, a police informant, and (2) his testimony at a preliminary hearing during which, petitioner alleges, he "recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified." Complaint at ¶¶ 19, 23; pet. a. 59-62. Petitioner's attempt to impose liability on respondents for this conduct is without foundation and fraught with practical difficulties.

Petitioner's proposed standard for determining whether the substantive component of the Due Process Clause has been violated—initiating a criminal prosecution without probable cause—would, even with the operation of qualified immunity, impose liability for merely negligent conduct on the part of the police. This standard, however, finds no support in the Court's substantive due process jurisprudence. While the Court has, over the years, articulated various formulations in attempting to give substance to the Due Process Clause, petitioner's standard does not fall within the type of intentional or deliberate decisions with which the Due Process Clause has traditionally been concerned. *See, e.g., Daniels v. Williams,* 474 U.S. 327, 332 (1986).

Moreover, while there is a tradition that a criminal prosecution be based on probable cause, *see, e.g., United States v. Calandra,* 414 U.S. 338, 343 (1974), it cannot be argued that initiating charges without an "objectively reasonable belief in probable cause," Pet. Br. at i, "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934). As both the grand juror's oath and the common law of malicious prosecution demonstrate, it is maliciousness, and not negligence or recklessness in the initiation of a criminal prosecution, that offends the "traditions and conscience of our people." *Id.*

Petitioner's standard would, in addition, distort the functioning of the criminal process. Given that annually some twenty-eight percent of all felony prosecutions terminate in favor of the accused, *see* U.S. Department of Justice,

Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991* 547 (Table 5.55), petitioner's proposed standard would lead to a flood of litigation. This would have a grave impact on the public safety because the police, if faced with personal liability for negligence in initiating charges, will decline to present close cases to the prosecutor's office despite the actual guilt of the suspect. And ironically, prosecutors, aware of the potential liability of the police, will, instead of promptly dismissing weak cases, pursue them in the hopes of developing evidence to negate potential claims.

Second, taken on a more specific level, petitioner's complaint asserts that Oliver initiated and continued a baseless prosecution because he relied "upon the inherently unreliable statements" of Moore. Complaint at ¶ 19, pet. a. 59. At bottom, petitioner's complaint is that Oliver relied on statements of an informant which Albright disputed. The Court, moreover, has never held that the decision to prosecute must be based on "reliable" evidence, but rather has repeatedly eschewed judicial inquiry into the quality and adequacy of the evidence necessary to support a criminal prosecution. *See, e.g., United States v. Calandra,* 414 U.S. at 344-45; *Costello v. United States,* 350 U.S. 359, 362-63 (1956). And as the Court has recognized, a judicial "probable cause determination is not a constitutional prerequisite to the charging decision." *Gerstein v. Pugh,* 420 U.S. 103, 125 n.26 (1975). As evidenced by the adoption of the Sixth Amendment, the "reliability" of the evidence supporting a criminal prosecution is to be tested in the crucible of the trial where the many protections of that amendment apply. Clearly then, petitioner's asserted right—to not be subjected to a criminal prosecution based on "inherently unreliable" information—"cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Reno v. Flores,* 113 S.Ct. 1439, 1447 (1993) (citations omitted).

Finally, petitioner's allegations are deficient as a matter of law to impose liability on respondent Oliver, a police detective, for initiating and continuing a criminal prosecution. While "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. 167, 187 (1961), that background does not hold a police officer liable for initiating a prosecution where he "merely states what is believed, leaving the decision to prosecute entirely to the uncontrolled discretion of" the prosecutor. W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984) (Prosser). Petitioner's complaint totally ignores the independent judgment and discretion exercised by the State's Attorney in initiating the prosecution against him. *See People v. Dandridge*, 505 N.E.2d 30, 31 (Ill. App. 1987); *People v. Woollums*, 379 N.E.2d 1385, 1390 (Ill. App. 1978). Because petitioner makes no allegation that Oliver withheld or falsified the evidence against him, there is no basis for concluding that "an intelligent exercise of the [prosecuting] officer's discretion [was] impossible," *Restatement (Second) of Torts* § 653 cmt. g, or that Oliver " 'caused' or 'procured' the prosecution." *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988).

Nor does petitioner's allegation that Oliver improperly continued the prosecution by "recklessly fail[ing] to advise the court of the inherently unreliable nature of the information to which he testified," Complaint at ¶¶ 19, 23; pet. a. 59-62, constitute the type of active participation required to impose liability. *See Restatement* § 655; Prosser § 119, at 872. As both sources note, merely testifying in a proceeding is not enough to impose liability for continuing a prosecution. *Id.* Because petitioner's complaint has failed to allege the "insist[ence] upon or urging [of] further prosecution" necessary to demonstrate "active participation," Restatement § 655 cmt. c., it is insufficient as a matter of law to impose liability.

ARGUMENT

I. A VIOLATION OF THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE MUST BE PREDICATED ON MORE THAN JUST NEGLIGENT CONDUCT

As the Court has recently reaffirmed, the "boundaries [of substantive due process] are not susceptible of expression as a simple rule." *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2806 (1992). "[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1068 (1992) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985)). Accordingly, " '[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever [it is] asked to break new ground in this field.' " *Flores*, 113 S.Ct. at 1447 (quoting *Collins*, 112 S.Ct. at 1068).

At its greatest level of generality, petitioner's complaint asserts that respondents deprived him of a right protected by the substantive component of the Due Process Clause when they "initiat[ed] and pursu[ed] a criminal prosecution against him without probable cause." Pet. Br. 3; *see also id.* at 9, 21-22. As a practical matter, petitioner's proposed probable cause standard, which requires plaintiffs to demonstrate only objective unreasonableness, would result in a finding that the Constitution has been violated based on merely negligent conduct on the part of respondents. Indeed, petitioner's probable cause standard has no foundation in the text of the Fifth or Fourteenth Amendments and is contrary to the Court's careful formulations of the type of governmental conduct that violates the substantive component of the Due Process Clause.

As the Court has recognized, " '[t]he substance of all definitions' of probable cause 'is a *reasonable* ground for the belief of guilt.' " *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (1881)) (emphasis added); *accord* Prosser § 119, at 876. The probable cause inquiry thus asks whether "the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." *Carroll v. United States*, 267 U.S. 132, 161 (1925) (citation omitted). As a leading authority has noted, "[a] want of probable cause thus involves unreasonable conduct under the circumstances and in that respect bears some resemblance to the idea of negligence." Prosser § 119, at 876; *see also Black's Law Dictionary* 1032 (6th ed. 1990) (defining negligence as "the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances").

Petitioner's proposed standard—that the Due Process Clause is violated whenever a criminal prosecution is initiated without probable cause—would result in a finding that the Constitution has been violated based on merely negligent conduct. And while petitioner would grant law enforcement officers qualified immunity, and thus impose liability only if an officer "files a criminal charge . . . without an objectively reasonable belief in probable cause," Pet. Br. 36, because the probable cause determination is already defined in terms of reasonableness, *see, e.g., Brinegar*, 338 U.S. at 175; *Carroll*, 267 U.S. at 161, the protection of qualified immunity is chimerical. In short, petitioner's standard for finding that the Constitution has been violated and for imposing liability on a police officer when charges have been initiated are the same—ordinary negligence. This standard of ordinary

negligence has no foundation in either the text of the Due Process Clause or the Court's cases interpreting it. Rather, it stems solely from petitioner's attempt to graft the Court's Fourth Amendment jurisprudence onto the Due Process Clause, an ill-considered effort that disregards the teachings of the Court's substantive due process cases.

The Court has long exercised its "reasoned judgment," *Casey*, 112 S.Ct. at 2806, to articulate various formulations in attempting to give substance to the Due Process Clause. As Justice Harlan observed:

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them.

Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

The Court has thus characterized the Due Process Clause as " 'intended to secure the individual from the arbitrary exercise of the powers of government,' " *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (*quoting Hurtado v. California*, 110 U.S. 516, 527 (1884) (*quoting Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)), and "to prevent governmental power from being 'used *for purposes of oppression*.' " *Id.* (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)) (emphasis added). The Court has accordingly noted that the "guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 331. Absent an in-

tentional deprivation of liberty, a state actor simply has not "engag[ed] in conduct that 'shocks the conscience.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)).

Petitioner's proposed standard thus finds no support in the Court's cases construing the Due Process Clause. The very notion of an "arbitrary exercise of the powers of government," *Daniels*, 474 U.S. at 331 (citations omitted), suggests conduct "arising from will or caprice," *Webster's New Collegiate Dictionary* 57 (1981), not negligence or reckless indifference. Similarly, neither negligent nor recklessly indifferent conduct in initiating a prosecution can fairly be said to involve an exercise of government power "used for the purposes of oppression." *Daniels*, 474 U.S. at 665. Such conduct simply does not fall within the type of "*deliberate* decisions of government officials to deprive a person of life, liberty or property" to which the Due Process Clause has been historically applied. *Id.* To require only a lesser showing of negligence or reckless indifference would "open the federal courts to lawsuits where there has been no affirmative abuse of power," *id.* (quoting *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring)), and "seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution." *Id.* (quoting *Parratt*, 451 U.S. at 545 (Stewart, J., concurring)).

To be sure, there is a tradition that a criminal prosecution be based on "probable cause." *See United States v. Calandra*, 414 U.S. 338, 343 (1974). To recognize as much, however, does not inexorably lead to the conclusion that negligence or even recklessness by a police officer in "initiating" charges "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

As Blackstone noted, "the finding of an indictment is only in the nature of an inquiry or accusation, which is

afterward to be tried and determined." 4 William Blackstone, *Commentaries on the Laws of England* 302 (1856) (J. Wendell, ed.). As evidenced by the Sixth Amendment and the many protections it provides the accused in the course of trial, the framers were clearly aware that no system of accusation is foolproof. *Cf. Baker v. McCollan*, 443 U.S. 137, 145 (1979) ("The Constitution does not guarantee that only the guilty will be arrested."). Accordingly, while the framers interposed the requirement of an indictment or presentment by a grand jury before subjecting a suspect to trial for a "capital, or otherwise infamous crime," U.S. Const. amend. V, it is clear that their primary purpose was to protect the accused from malicious and oppressive criminal prosecutions. As the Court has recognized:

> Under the ancient English system . . . the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded on credible testimony *or dictated by malice or personal ill will.*

Hale v. Henkel, 201 U.S. 43, 59 (1906) (emphasis added); *see also Costello v. United States*, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and *unbiased* grand jury, . . . if valid on its face is enough to call for trial of the charge on the merits.") (emphasis added).

Consistent with the historic role of the grand jury, the grand juror's oath prescribes:

> You will present no person through malice, hatred, or ill-will, nor leave any unpresented through fear, favor or affection, or for any reward, or the promise or hope thereof; but in all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding . . . .

American Law Institute, *Code of Criminal Procedure* § 126 (1930) (*A.L.I. Code of Criminal Procedure*); *see also Federal Grand Jury Handbook* 12 (1958). The grand juror's oath compellingly demonstrates that a substantive due process claim for initiating a prosecution contains both an objective and subjective component. The oath does not bind grand jurors to vote for an indictment only if a reasonable grand juror would do so or to exercise the skill or understanding of a reasonable grand juror. Rather, the oath, in binding grand jurors to "present the truth . . . according to the best of [their] skill or understanding," *A.L.I. Code of Criminal Procedure* § 126, necessarily embodies a subjective inquiry. In voting to indict, grand jurors may have acted upon evidence that no reasonable grand juror would have voted to indict on. But so long as those grand jurors acted "according to the best of [their] skill or understanding," *id.*, they have not violated their oaths. And if grand jurors, with their wide ranging authority to both investigate and indict, *see, e.g., United States v. Williams*, 112 S.Ct. 1735, 1742 (1992), do not violate their oaths under such circumstances, then it is difficult to understand why merely initiating charges without an objectively reasonable belief in probable cause "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*, 291 U.S. at 105. As the grand juror's oath demonstrates, "the traditions and conscience of our people," *id.*, are offended only if grand jurors, in violation of their oath, "present [a] person through malice, hatred, or ill-will." *A.L.I. Code of Criminal Procedure* § 112; *see also Federal Grand Jury Handbook* at 12.

While the grand jury system represented the ultimate protection for a criminal suspect, it was not the exclusive means of initiating a criminal prosecution under the common law. Charging by information "is as ancient as the common law itself," 4 W. Blackstone, *Commentaries* 309, and has long been sanctioned by this Court. *Hurtado v.*

California, 110 U.S. 516 (1884). It is now used not only in the federal system, *see* Fed. R. Crim. P. 7, but also in approximately two-thirds of the States. Yale Kamisar *et al., Modern Criminal Procedure* 890-91 (7th ed. 1990). And as the Court has recognized, "a judicial hearing is not [a] prerequisite to prosecution by information." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

Yet despite the widespread use of the information, the common law has never recognized a claim for "a groundless criminal prosecution." *See* Pet. Br. at i (Petitioner's Question Presented). Rather, it recognizes a claim for *malicious* prosecution which, just as its name suggests, does not lie merely because an accuser lacked probable cause. *See, e.g., Wheeler v. Nesbitt*, 65 U.S. (24 How.) 544, 549-51 (1861) ("The plaintiff must show that the defendant acted from *malicious motives* in prosecuting him") (emphasis in original); *Munns v. DeNemours*, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811) (No. 9,926) ("The question upon which this cause must be decided, is . . . whether the charge was made maliciously, and without probable cause."). As these authorities demonstrate, for this claim to be cognizable, the accuser had to have acted with " '[m]alice,' *or* [*for*] *a primary purpose other than that of bringing* [*the*] *offender to justice*." Prosser § 119, at 871 (emphasis added); *see also Restatement (Second) of Torts* §§ 653, 668 (1977). By reading out the subjective component of malice, petitioner's proposed standard would be far easier to satisfy than the standard of both the common law and Illinois for malicious prosecution and would do far more than make the Due Process Clause "a font of tort law to be superimposed upon" the States. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Rather, it would make the Due Process Clause a wellspring for claims by ex-defendants, chilling the police in the performance of their duties.

The flood of such litigation would be substantial. As a 1988 survey of the Bureau of Justice Statistics on the disposition of prosecuted criminal cases in fourteen States

indicates, twenty-eight percent of these cases resulted in dismissal, acquittal or nolle prosequi; the total number of persons prosecuted in these States was 536,708. U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991* 547 (Table 5.55).[2] If, as petitioner argues, the Due Process Clause is violated whenever a police officer initiates charges while lacking probable cause or an objectively reasonable belief in probable cause, then many of the hundreds of thousands of formerly accused would be entitled to bring suit and conduct discovery as to whether the police officer was negligent in initiating the charges against them.

The impact of petitioner's regime on the public safety would be substantial and would seriously disrupt the functioning of the criminal process. Police officers, faced with the prospect of personal liability for negligence in initiating charges, will decline to do so in close cases despite the actual guilt of the suspect. Petitioner's proposed liability regime would thus threaten the public

[2] Other Department of Justice statistics are consistent with these figures. A Justice Department survey of cases prosecuted by twelve States in 1987 indicates that for all offenses, twenty-seven percent resulted in dismissal, acquittal or nolle prosequi; the total number prosecuted was 520,925. *See* U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics—1990* 520 (Table 5.42).

Even though in many of these cases, there has been a judicial determination of probable cause to bind over for trial, this finding is generally not appealable. *See Whitley v. Seibel*, 676 F.2d 245, 249-50 (7th Cir. 1982). Accordingly, because defendants have arguably not received a "full and fair opportunity to litigate" the existence of probable cause, *Allen v. McCurry*, 449 U.S. 90, 101 (1980), they are not collaterally estopped from raising the issue in a subsequent § 1983 suit. *Cf.* Prosser § 119, at 881 (noting that magistrate's finding of probable cause only furnishes evidence or a presumption of probable cause); *White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988) ("though an indictment by a grand jury is generally considered *prima facie* evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be rebutted by proof that the defendant misrepresented, withheld, or falsified evidence").

safety by allowing many guilty persons to avoid prosecution. Moreover, because the police simply will not present these cases to the prosecuting authority, petitioner's regime would undermine the role of the prosecutor by denying that office the right to review cases to determine whether further proceedings are warranted.

Even where the police continue to refer close cases to the prosecuting authority, petitioner's regime would be injurious to the public interest. Prosecutors, aware of the potential liability of the police for initiating "baseless prosecutions," would pursue cases simply for the purpose of negating the elements of the cause of action.[3] Petitioner's regime would not only lead to the squandering of scarce resources, but also to the ironic result that a suspect will be subjected to the anxiety of a continued prosecution which otherwise would have been promptly dismissed.

Petitioner's reading out of the subjective component of malice thus runs counter to the strong public policy favoring the "bring[ing of] criminals to justice" and the finality of litigation. Prosser § 119, at 871, 876. If, under the common law, these policies require that the ordinary citizen who accuses one of crime "must be given a large degree of freedom to make mistakes and misjudgments without being subjected to liability," *id.* at 871, then surely a police officer, who must investigate numerous reports of various crimes, deserves no less.

To be sure, being subjected to any criminal prosecution imposes burdens on a defendant. Those burdens, however, must be balanced against the public interest

[3] At least under the common law, a plaintiff was required to prove as an element of his cause of action the "[t]ermination of the proceeding in [his] favor." Prosser § 119, at 871. Moreover, even though "[p]robable cause is judged by appearances to the defendant at the time he initiates [the] prosecution," later-discovered evidence is relevant to establish the defense of "the accused's guilt in fact." *Id.* Accordingly, under petitioner's regime, prosecutors will have a strong incentive to pursue further proceedings in order to protect the police from liability.

in bringing criminals to justice. *Id.* The long tradition of the common law of malicious prosecution demonstrates that these burdens, by themselves, do not justify imposing liability merely for negligent conduct.[4]

Moreover, to argue, as petitioner does, that the substantive component of the due process clause provides a right to not be prosecuted without probable cause because such a prosecution "unreasonably puts an accused at risk of [being] wrongful[ly] convict[ed]," Pet. Br. at 19, simply proves too much. Absent a complete abdication of the judicial role or misconduct on the part of the police, a prosecution initiated without probable cause can never result in an unjust conviction. At trial, "the prosecution has the burden of production on every element of the offense charged." *Project—Twentieth Annual Review of Criminal Procedure*, 79 Geo. L. J. 591, 1076 n.2096 (1991). If a prosecution lacks probable cause, by definition it will not survive the more exacting standard of a motion for judgment of acquittal.[5] Even

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[4] Petitioner's standard for imposing liability is also firmly repudiated by the *Restatement*, which states:

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section *even though the information proves to be false and his belief was one that a reasonable man would not entertain.*

Restatement § 653 cmt. g (emphasis added).

[5] *Compare* Prosser § 119, at 876 ("Probable cause is a reasonable ground for belief in the guilt of the party charged"; however, "the facts need not warrant a belief in guilt beyond a reasonable doubt[.]"); *Brinegar*, 338 U.S. at 175 (quoting *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813)) (Probable cause "'means less than evidence which would justify condemnation' or conviction."), *with* Yale Kamisar *et al.*, *Modern Criminal Procedure* 1403 (7th ed. 1990) (discussing motion for judgment of acquittal) ("The prevailing view is that 'the criminal defendant is entitled to an acquittal if reasonable men could not conclude on the evidence

when a defendant's lawyer fails to move for dismissal, the Due Process Clause's "requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt," *In Re Winship*, 397 U.S. 358, 361 (1970), ensures that a defendant will not be "wrongfully convicted." If a defendant has been convicted, it is because the State has met its burden of proving beyond a reasonable doubt "the existence of every fact essential to constitute the crime charged." *Davis v. United States*, 160 U.S. 469, 485 (1895). In the unlikely event that both judge and jury have abdicated their roles resulting in a conviction based on evidence which does not even establish probable cause, then appellate review, applying the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)—whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"—surely will result in a reversal of the conviction. *See also id.* at 318 ("the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . [is] to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt"). If the prosecution has met this standard, it has necessarily met the lesser standard of probable cause. Contrary to petitioner's assertion then, a prosecution lacking in probable cause does not, by itself, subject an accused to an unreasonable risk of being wrongfully convicted.

Amici acknowledge that a prosecution lacking probable cause and motivated by malice can, in some circumstances, subject an accused to an unreasonable risk of being wrongfully convicted. Where, for example, the

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taken in the light most favorable to the prosecution that guilt has been proved beyond a reasonable doubt.'"); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt.").

police corrupt the truth-seeking function of the criminal trial process by engaging in egregious conduct such as destroying or withholding exculpatory evidence, *cf. Arizona v. Youngblood*, 488 U.S. 51 (1988); *Brady v. Maryland*, 373 U.S. 83 (1963); falsifying evidence, *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988); or suborning perjury, *cf. Mooney v. Holohan*, 294 U.S. 103 (1935), it is fair to say that they have "arbitrar[ily] exercise[d]" governmental power "for purposes of oppression." *Daniels*, 474 U.S. at 331 (citations omitted); *see also Morales v. Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990); *Barnier v. Szentmiklosi*, 810 F.2d 594, 599 (6th Cir. 1987). Not only does such conduct "offend[] . . . principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder*, 291 U.S. at 105, it also embodies the type of "*deliberate* decisions of governmental officials to deprive a person of . . . liberty" with which the substantive component of the Due Process Clause has been traditionally concerned.[6] *Daniels*, 474 U.S. at 332 (emphasis in original); *cf. Youngblood*, 488 U.S. at 58 (absent bad faith on the part of police, "failure to preserve potentially useful evidence does not constitute a denial of due process"). A malice component is thus consistent with the Court's substantive due process cases and prevents the "trivial-

[6] In *Brady*, the Court noted that "the suppression by the prosecution of evidence favorable to an accused upon request violates Due Process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In the Court's view, the prosecutor's motive was irrelevant because of the need to provide a fair trial. *Id.* As the Court noted, this principle was "not [founded on] punishment of society for [the] misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* Accordingly, *Brady* is properly viewed as resting on the procedural component of the Due Process Clause, the purpose of which "is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State." *Collins*, 112 S.Ct. at 1068. Petitioner, of course, has repeatedly stated that his claim is based on the substantive component of the Due Process Clause. *See* Pet. Br. 12-13, 19-22.

iz[ation]" and "distort[ion] of the meaning and intent of the Constitution," *Daniels*, 474 U.S. at 330 (quoting *Parratt*, 451 U.S. at 545 (Stewart, J., concurring)), by ensuring that only "affirmative abuse[s] of power," *id.* (quoting *Parratt*, 451 U.S. at 549 (Powell, J., concurring)), are cognizable under the Due Process Clause. Because no such affirmative abuse is alleged by petitioner, his complaint was properly dismissed.

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE CRIMINAL CHARGES TO BE BASED ON "RELIABLE" EVIDENCE

1. Turning to the specific factual allegations of the complaint, the gravamen of petitioner's baseless prosecution claim is that Oliver lacked probable cause to initiate the prosecution because he relied "upon the inherently unreliable statements" of an informant. Complaint at ¶ 20, pet. a. 43; *see also id.* at ¶ 24, pet. a. 45-46. The Court has, of course, recognized that historically, grand jury indictments have been based on "probable cause." *Calandra*, 414 U.S. at 343. But even if the Due Process Clause requires that a criminal prosecution be based on probable cause, petitioner's standard, with its roots in the Court's Fourth Amendment jurisprudence, *see, e.g., Illinois v. Gates*, 462 U.S. 213, 232-35 (1983), is inapplicable to the decision to initiate criminal charges.

As the Court has stated, "probable cause is a fluid concept." *Id.* at 232. Because arrest and detention involve a significant restraint on an individual's liberty qualitatively more serious than being charged with a crime, to the extent the Due Process Clause may require that the initiation of charges be based on probable cause, the probable cause inquiry must be tailored to the different interests which the Due Process Clause serves.[7] The Court has

[7] As Blackstone noted:

> In order to carry on [an action for malicious prosecution], it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is *any*,

acknowledged as much holding that because a judicial "probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975).

Of equal importance, the Court has never held that the decision to prosecute must be based on "reliable" evidence, but rather, has eschewed judicial inquiry into the adequacy and reliability of the evidence supporting the decision to prosecute.[8] The Court, for example, has long recognized that:

> The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.

> *the least, probable cause* to found such prosecution upon. For it would be a very great discouragement to the public justice . . . if prosecutors, who had a *tolerable ground of suspicion*, were liable to be sued at law whenever their indictments miscarried.

III W. Blackstone, *Commentaries* at 126 (1856) (emphasis added) (footnotes omitted).

[8] The Court's longstanding concern that the police, when using informants, establish that the information provided is reliable prior to conducting searches or arrests, *see Gates*, 462 U.S. at 230-238; *Spinelli v. United States*, 393 U.S. 410, 414-419 (1969), *overruled by Gates*; *Aguilar v. Texas*, 378 U.S. 108, 112-15 (1964), *overruled by Gates*, is supported because informants either frequently retain anonymity or demand it as a condition of giving information to the police; the informer's privilege also protects them from being called to testify. *See generally* 1 Wayne R. LaFave, *Search and Seizure—A Treatise on the Fourth Amendment* § 3.3(g) (2d ed. 1987). This concern is minimized, however, when, as here, the prosecutor's case against the accused will require the testimony of the source of the "unreliable" statements and the defendant will have the opportunity to cross-examine the witness.

Calandra, 414 U.S. at 344-45 (citations omitted); *see also Costello v. United States*, 350 U.S. 359, 362-63 (1956). Petitioner's attempt to graft the Fourth Amendment's probable cause standard onto the Due Process Clause is thus inconsistent with the Court's settled understanding of the quality of evidence necessary to support the initiation of a criminal prosecution.

At common law, the grand jury was "not hampered by rigid procedural or evidential rules," but instead, "w[as] free to make [its] presentments or indictments on such information as [it] deemed satisfactory." *Costello*, 350 U.S. at 362. Grand juries, while duty bound to "present the truth," *see Federal Grand Jury Handbook* at 12-13; *A.L.I. Code of Criminal Procedure* § 126, have had free reign to consider evidence inadmissible in a trial because of its unreliability. As the Court noted in *Costello*, "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." 350 U.S. at 362. Absent prosecutorial abuse, the grand jury's decision to indict was unreviewable. As Justice Nelson, while riding circuit, stated: "No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." *United States v. Reed*, 27 F. Cas. 727, 738 (C.C.N.D.N.Y. 1852) (No. 16,134).

Accordingly, the Court has never sanctioned the quashing of indictments because they are based on incompetent, unreliable or insufficient evidence. *See United States v. Williams*, 112 S.Ct. 1735, 1745-46 (1992); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988). In *Holt v. United States*, 218 U.S. 245 (1910), an indictment was challenged on the ground that it was based, in part, on incompetent evidence, and aside from which "there was very little evidence against the accused." 218 U.S. at 247. The Court nonetheless refused to quash the indictment. *Id.* at 248.

In *Costello,* the defendant moved to dismiss an indictment on the ground that it had been based entirely on hearsay evidence. 350 U.S. at 361. The Court held the indictment was proper, stating:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

350 U.S. at 363 (footnote omitted). If an indictment can be lawfully based on hearsay evidence, which is otherwise inadmissible in a trial when it lacks "adequate 'indicia of reliability,' " *Ohio v. Roberts,* 448 U.S. 56, 66 (1980),[9] it is difficult to understand why a criminal information, lacking in probable cause solely because it is based "upon the inherently unreliable statements," Complaint at ¶ 20, pet. a. 43, of an informant, violates the Due Process Clause. *Cf. Bank of Nova Scotia,* 487 U.S. at 261 ("the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment"); *cf. Lawn v. United States,* 355 U.S. 339, 348-50 (1958) (upholding indictment based on illegally obtained evidence).

Petitioner's complaint also alleges that at the preliminary hearing, "Oliver recklessly failed to advise the court of the inherently unreliable nature of the information

[9] *See also White v. Illinois,* 112 S.Ct. 736, 742-43 (1992); *Idaho v. Wright,* 497 U.S. 805, 814-22 (1990); *Bourjaily v. United States,* 483 U.S. 171, 182-84 (1987); *Chambers v. Mississippi,* 410 U.S. 284, 298 (1973).

to which he testified," resulting in the court's finding that probable cause existed to bind the matter over for further proceedings. Complaint at ¶ 24, pet. a. 46. In *Williams,* however, the Court rejected an attempt to impose on prosecutors the duty to present exculpatory evidence to the grand jury. 112 S.Ct. at 1745-46. Because "[a] complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was 'incomplete' or 'misleading,' " the Court stated that "[i]t would make little sense . . . to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation." 112 S.Ct. at 1746 (footnote omitted). As the Court noted, "[r]eview of facially valid indictments on such grounds 'would run counter to the whole history of the grand jury institution' " and was required by " '[n]either justice nor the concept of a fair trial.' " *Id.* (*quoting Costello,* 350 U.S. at 364.)

The disclosure of exculpatory evidence would, of course, frequently lead the grand jury to conclude that the prosecutor's evidence is unreliable and that there is no "probable cause" to indict. Yet if the Constitution does not require a prosecutor to disclose exculpatory evidence to the grand jury,[10] then, in the context of a preliminary hearing, it certainly could not have required Oliver, in the absence of questioning by counsel, to "advise the court of the inherently unreliable nature of the information to which he testified." Complaint at ¶ 24, pet. a. 46. If petitioner is correct in his premise that the substantive component of the Due Process Clause provides a right to not be subjected to a criminal prosecution

[10] While grand jurors may require the production of exculpatory evidence, they have no duty to hear such evidence. *See A.L.I. Code of Criminal Procedure* § 139. As an accusatory body, the grand jury ordinarily assesses only the State's case; it is "to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." *Id.* at 510 (Commentary to § 140).

based on "inherently unreliable" evidence, then clearly those States which allow for charges to be brought by information must not only provide a judicial hearing but allow for cross-examination of the State's witnesses. The Court, however, has never gone so far as to hold that an "accused is entitled to judicial oversight or review of the decision to prosecute." *Gerstein*, 420 U.S. at 119. Rather, it has repeatedly held "that a judicial hearing is not [a] prerequisite to prosecution by information." *Id.*; *see also Beck v. Washington*, 369 U.S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913); *McNulty v. California*, 149 U.S. 645, 648 (1893); *cf.* Fed. R. Crim. P. 5(c) (providing that "the preliminary examination shall not be held . . . if an information against the defendant is filed in district court before the date set for the preliminary examination"). Moreover, even when the State provides for a preliminary hearing, the Constitution does not require the State to allow for the cross-examination of its witnesses unless it seeks to preserve their testimony. *Cf. United States v. Andrus*, 775 F.2d 825, 836 (7th Cir. 1985); *United States v. Harris*, 458 F.2d 670, 677-78 (5th Cir.), *cert. denied*, 409 U.S. 888 (1972).

Accordingly, while there is a tradition that criminal charges be based on probable cause, petitioner errs in his contention that the Due Process Clause requires that the charging decision be based on "reliable" evidence.[11] If the accused is not entitled to judicial review of the evidentiary support for a charge it is surely because the reliability of the evidence is to be challenged through the crucible of trial where the accused is protected by the rights of the Sixth Amendment—namely, the right "to a speedy and public trial by an impartial jury," "to be informed of the nature and cause of the accusation; to be confronted with

[11] Even today, grand juries may indict based on their own knowledge of a crime. *See Federal Grand Jury Handbook* at 12; *A.L.I. Code of Criminal Procedure* § 126. Grand jurors, while duty bound "to present the truth," *id.*, are not required to disbelieve their sources.

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* 4 W. Blackstone, Commentaries 303 (1856) ("the finding of an indictment is only in the nature of an inquiry or accusation, which is afterward to be tried and determined"). If " '[n]either justice nor the concept of a fair trial,' " *Williams*, 112 S.Ct. at 1746 (*quoting Costello*, 350 U.S. at 364), require review of "the quality or adequacy of the evidence" underlying an indictment or information, *id.*, then surely the Due Process Clause is not violated merely because a criminal prosecution is initiated based on allegedly "inherently unreliable" information. And if an "accused is [not] entitled to judicial oversight or review of the decision to prosecute" before trial, *Gerstein*, 420 U.S. at 119, then petitioner should not be entitled to judicial review of the adequacy of the evidence supporting the decision to prosecute by bringing a "baseless prosecution" claim after trial. "The mere novelty of [petitioner's] claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right [to not be prosecuted based on "inherently unreliable" evidence] certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Flores*, 113 S.Ct. at 1447 (*quoting United States v. Salerno*, 481 U.S. 739, 751 (1987) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

2. To the extent petitioner seeks to impose liability on Oliver because, in initiating the charge, he relied on an informant who was not credible, *see* Complaint ¶ 23, pet. a. 61-62, the complaint once again fails to state a violation of the substantive component of the Due Process Clause. While for the purposes of obtaining a search or arrest warrant, the Court formerly required indicia that "the informant . . . was 'credible' or his information 'reliable,' " *see Aguilar v. Texas*, 378 U.S. 108, 114 (1964) (internal citation omitted), *overruled by Illinois v. Gates*, 462 U.S. 213 (1983), in the context of a criminal trial, credibility is always an issue to be deter-

mined by the jury. As the Court has recognized, "[e]ven the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal." *Burks v. United States*, 437 U.S. 1, 16 (1978).

That Moore gave Oliver "contradictory" information regarding the name of the person who had sold her cocaine, *see* Complaint ¶¶ 15, 18-21, 23; pet. a. 57-61, does not alter the analysis. At trial, the fact that a witness has given contradictory testimony is not enough to take the case from the jury because the trial court is required to view the evidence and its inferences in the light most favorable to the prosecution. *Burks*, 437 U.S. at 16. Clearly then, if Moore had testified at trial as to the same statements she was alleged to have made to Oliver, a trial judge could not have granted a motion for a judgment of acquittal based on Moore's lack of credibility, but would have been required to submit this issue to the jury. Given this, there is certainly no basis for concluding that the substantive component of the Due Process Clause contains a right to not be subjected to a criminal prosecution which is based on a lack of credible testimony. As the standard for ruling on a motion for a judgment of acquittal demonstrates, "the alleged right [to not be prosecuted based on a lack of credible testimony] certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Flores*, 113 S.Ct. at 1447 (*quoting Salerno*, 481 U.S. at 751 (*quoting Snyder*, 291 U.S. at 105)).[12]

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[12] To the extent that police officers can be said to initiate criminal prosecutions, they act only as accusers and should not, in the absence of actual knowledge that a witness has lied to them, be subjected to judicial second-guessing of their decisions to refer charges to the prosecutor. *See, e.g., Restatement* § 653 cmt. g. Of course, where a police officer has actual knowledge that a witness has lied to him and nevertheless proceeds to refer charges, that officer can be said to have acted with malice.

III. ABSENT AFFIRMATIVE MISCONDUCT WHICH CORRUPTS THE PROSECUTOR'S DECISION TO PROSECUTE, A POLICE OFFICER CANNOT BE HELD LIABLE FOR INITIATING A "BASELESS PROSECUTION"

1. In seeking to impose liability on respondent Oliver, a police detective, for initiating a groundless criminal prosecution, *see, e.g.*, Complaint ¶ 20, 21, 24, pet. a. 43-46; Pet. Br. at i, 36, petitioner's complaint is fatally flawed in two additional respects. First, it ignores the independent role of the State's Attorney under Illinois law in deciding whether to pursue criminal charges. Second, petitioner's complaint makes no allegation that respondent Oliver engaged in any conduct which corrupted the prosecutor's independent assessment of the merits of the case.

The Court has, of course, stated in dictum that "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *see also Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986). "[T]he background of tort liability," however, does not hold a police officer liable for malicious prosecution where he "merely states what is believed, leaving the decision to prosecute entirely to the uncontrolled discretion of" the prosecutor. Prosser § 119, at 872. In such a case, a police officer "is not regarded as having instigated the proceeding." *Id.* at 872-73. As the *Restatement* explains:

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable . . . even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Restatement § 653 cmt. g. Consistent with this background of tort liability, the Second Circuit has noted that "[t]he exercise of independent judgment by the public prosecutor and his active role in initiating criminal prosecutions . . . decrease the likelihood that a complaining witness will be considered to have 'caused' or 'procured' the prosecution, thus defeating grounds for liability under this initial prong of the common law standard." *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988).

Petitioner's complaint simply ignores this background of tort liability and the independent role of the prosecutor, both generally and as a matter of Illinois law, in initiating the charge against him. As the American Bar Association has recognized:

> Historically, the power to initiate prosecution was not vested exclusively in public officials but was shared with private citizens. The essential screening to determine whether there was substance to the charges was performed by the magistrate at the preliminary hearing or by the grand jury. The emergence of the professional prosecutor which occurred in the United States fundamentally altered this situation. The advent of the office of public prosecutor provided a new and professional medium of screening which had not previously been available; moreover, it provided continuity in office and experience in the evaluation of evidence to determine the need for prosecution.

American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* § 3.4 cmt. c. (1970) (ABA Standards). "The charging decision is the heart of the prosecution function"; *id.* at § 3.9 cmt. a., "[t]he *exercise of prosecutorial discretion* in the screening, charging, and diversion decisions are not only integral parts of the American criminal justice system but are also the most important aspect of the prosecutorial function." National District Attorneys Association, *National Prosecution Standards* 127 (2d ed. 1991) (emphasis added).

Accordingly, the complex determination of what "charges would best serve the interests of justice . . . is the prerogative and responsibility of the prosecutor." *Id.* at 131; *see also* ABA Standards at § 3.9 cmt. a.

Illinois law embodies these national standards. Under Illinois law, it is the duty of the State's Attorney "[*t*]*o commence and prosecute* all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned."[13] 55 Ill. Code § 5/3-9005 (emphasis added). The Illinois courts have recognized that under this statutory grant, "[t]he State's Attorney has the responsibility of evaluating evidence and other pertinent factors and determining what, if any, offense may be charged." *Ware v. Carey*, 394 N.E.2d 690, 694 (Ill. App. 1979) (citation omitted). As the Illinois courts have recognized, "the State's [A]ttorney is vested with exclusive discretion in the initiation and management of a criminal prosecution . . . including the decision whether to prosecute at all." *People v. Dandridge*, 505 N.E.2d 30, 31 (Ill. App. 1987); *accord Ware*, 394 N.E.2d at 694 (citation omitted); *People v. Mulcahey*, 365 N.E.2d 1013, 1016 (Ill. App. 1977), *aff'd*, 381 N.E.2d 254 (Ill. 1978); *People v. Byrnes*, 341 N.E.2d 729, 731 (Ill. App. 1975).[14]

To be sure, under Illinois law, a police officer, like any other citizen, can swear out an information. 725 Ill. Code § 5/111-3(b). There can be no doubt, however, that

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[13] Under Illinois law, the State's Attorney is a constitutional officer exercising executive power. *People v. Thompson*, 410 N.E.2d 600, 601 (Ill. App. 1980). Each county elects a State's Attorney to serve for a four year term as the county's chief legal officer. Ill. Const. Art. 6, § 19; 55 Ill. Code § 5/3-9005.

[14] *See also* ABA Standards § 1.1 (commentary) ("The prosecutor is in the best position to observe the work of the police in the investigation of crime and in the enforcement of the law. He has large responsibility in the decision whether to bring charges and, if so, what charges to bring against the accused, and the decision whether to prosecute or to dismiss charges, or to take other appropriate actions in the interest of justice.").

the decision to prosecute is vested in the State's Attorney and not the police. By statute, the State's Attorney must review and sign the information. *Id.* And as the Illinois courts have stated:

> While a police officer has a considerable latitude in charging an individual, the ultimate responsibility of filing a charge and prosecuting it lies with the State's Attorney. Thus, the actions of the police officer in the first instance yield to the judgment and discretion of the constitutional officer empowered to take final action.

People v. Woollums, 379 N.E.2d 1385, 1390 (Ill. App. 1978); *see also Dandridge*, 505 N.E.2d at 31 ("An official other than the State's Attorney does not have the authority to determine prosecution for criminal conduct.").

Petitioner simply ignores the independent judgment and discretion exercised by the State's Attorney in initiating the prosecution against him. *See* Complaint ¶¶ 20-24, pet. a. 43-46. Significantly, petitioner's complaint contains no allegation that respondent Oliver corrupted the State's Attorney's decision to prosecute him by either withholding critical evidence from the prosecutor, misrepresenting the evidence against him, or furnishing false information. *See generally id.* In the absence of such allegations, there is no basis for concluding that "an intelligent exercise of the [prosecuting] officer's discretion [was] impossible," *Restatement* § 653 cmt. g., or that respondent "'caused' or 'procured' the prosecution." *White*, 855 F.2d at 962. The existing "background of tort liability", *Monroe*, 365 U.S. at 187, thus demonstrates that the complaint, even when construed in the light most favorable to petitioner, is insufficient as a matter of law to state a claim against respondents for having "caused" or "procured" a baseless criminal prosecution.

2. Petitioner also seeks to impose liability on respondent Oliver for continuing or pursuing a baseless prosecution

based on his testimony at the preliminary hearing. According to petitioner's complaint, Oliver "recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified and which information . . . was at odds with testimony he had" given earlier to a grand jury. Complaint ¶ 24, pet. a. 46. As petitioner alleges, this led the Illinois Circuit Court to "f[ ]nd] probable cause and b[ind] the matter over for further proceedings." *Id.* Because these allegations are insufficient as a matter of law to impose liability for continuing or pursuing a prosecution, the Court should reject this aspect of petitioner's claim as well.

As the background of existing tort law demonstrates, liability can be imposed on a defendant for continuing a criminal prosecution even though the prosecution was initiated by a third party. *See Restatement* § 655. To impose liability for continuing a prosecution, however, the defendant must have "take[n] an active part in continuing or procuring the continuation of" the proceedings. *Id.; see also* Prosser § 119, at 872 ("the defendant cannot be held responsible unless the defendant takes some active part in . . . encouraging the prosecution"). "It is not enough" to allege, as petitioner has, that one has "appear[ed] as a witness against the accused either under subpoena or voluntarily, . . . thereby aid[ing] in the prosecution of the charges which he knows to be groundless." *Restatement* § 655 cmt. c; *see also* Prosser § 119, at 872 ("The defendant is not liable merely . . . for appearing as a witness against the accused, even though the testimony be perjured"); *cf. Briscoe v. LaHue*, 460 U.S. 325 (1983) (recognizing absolute immunity of police officer for testifying in criminal trial). As the *Restatement* notes, a defendant's "share in continuing the prosecution must be active, as by insisting upon or urging further prosecution." *Restatement* § 655 cmt. c.

Petitioner's allegations fall far short of the mark in establishing respondent's liability for continuing the prosecution of him. Petitioner does not allege the type of "insist[ence] upon or urging [of] further prosecution" neces-

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sary to demonstrate respondent's "active participation" in continuing the prosecution. *Id.* Rather, petitioner's allegations rest solely on Oliver's having appeared as a witness against him at the preliminary hearing, *see* Complaint ¶ 24, pet. a. 45-46, which, as a matter of law, is insufficient to establish respondent's "active participation" in the continuance of the prosecution. *Restatement* § 655 cmt. c.; Prosser § 119, at 873.

Nor does Oliver's having "recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified," Complaint ¶ 24, pet. a. 45-46, render him an "active participant." As Prosser notes, a "defendant is not liable merely . . . for appearing as a witness against the accused, even though the testimony be perjured." Prosser § 119, at 872. If perjury is not actionable, then surely petitioner's allegations are not either. And in any event, Oliver's "reckless fail[ure] to advise the court" simply does not rise to the level of deliberate and egregious conduct with which the Court's substantive due process cases have been traditionally concerned.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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June 25, 1993